EXCERPTS FROM AN ACT ENTITLED "AN ACT TO COMPEL THE DETERMINATION OF CLAIMS TO REAL ESTATE IN CERTAIN CASES, AND TO QUIET THE TITLE TO THE SAME."

4 Compiled Statutes of New Jersey, page 5399.

"1. Suit to quiet title by person in possession; persons presumed to be in possession of wild lands, etc. That when any person is in peaceable possession of lands in this State, claiming to own the same and his title thereto or to any part thereof is denied or disputed, or any other person claims or is claimed to own the same or any part thereof, or any interest therein, or to hold any lien or incumbrance thereon, and no suit shall be pending to enforce or test the validity of such title, claim or incumbrance, it shall be lawful for such person so in possession to bring and maintain a suit in chancery to settle the title of said lands, and to clear up all doubts and disputes concerning the same; the bill of complaint in such suit shall describe the lands with certainty, and shall name the person who claims, or is claimed or reputed to have such title or interest in or incumbrance on said lands, and shall call upon such person to set forth and specify his title, claim or incumbrance, and how and by what instrument the same is derived or created; and whenever any lands within this State shall not, by reason of their extent or by reason of such lands being wild or wood or waste or uninclosed or unimproved lands, be in the actual peaceable possession of the owner or person claiming to own the same, the owner or per-

son claiming to own the same in fee under a deed or other instrument, duly recorded within this State, who shall have paid the taxes upon such lands and to whom or to whose grantors the taxes upon such lands shall have been assessed for five consecutive years immediately prior to the commencement of suit, shall be presumed to be in peaceable possession of such lands within the meaning of this Act; provided, no other person be in possession thereof; and it shall be lawful for such person so presumed to be in possession to bring and maintain a suit in chancery to settle the title of said lands and to clear up all doubts and disputes concerning the same, and such person so presumed to be in possession shall be entitled to all the benefits of and subject to all the provisions of this Act. (Rev. 1877, p. 1189, as amended P. L. 1901, p. 587.)"

"4. Answer of defendant claiming any estate; specification of title, etc. That if any defendant shall answer claiming any estate, or interest in, or incumbrance on said lands or any part thereof, he shall in such answer specify and set forth the estate, interest or incumbrance so claimed, and if not claimed in or upon the whole of said lands, he shall specify and describe the part in or upon which the same is claimed, and shall set out the manner in which, and the sources through which such title or incumbrance is claimed to be derived. (Rev. 1877, p. 1190.)"

"5. Issue at law may be directed on application of either party. That upon application of either party, an issue at law shall be directed to try the validity of such claim, or to settle the facts, or any specified portion of the

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facts upon which the same depends, and the Court of Chancery shall be bound by the result of such issue, but may, for sufficient reasons, order a new trial thereof, according to the practice in such cases; and when such issue is not requested, or as to the facts for which the same is not requested, the Court of Chancery shall proceed to inquire into and determine such claims, interest and estate, according to the course and practice of that court; and shall, upon the finding of such issue, or upon such inquiry and determination, finally settle and adjudge whether the defendant has any estate, interest or right in, or incumbrance upon said lands, or any part thereof, and what such interest, estate, right or incumbrance is, and in or upon what part of said lands the same exists. (Rev. 1877, p. 1190.)"

"6. Decree to settle rights of all parties and to be conclusive. That the final determination and decree in such suit, shall fix and settle the rights of the parties in said lands, and the same shall be binding and conclusive on all parties to the suit; but if any defendant to such suit, shall, either at the time of the decree *pro confesso* against him, or at the final decree, be an infant or *non compos mentis*, such party, his heirs or assigns, at any time within two years after the termination of such disability, may appear in said suit, and apply for a rehearing, and thereupon such decree shall be opened as against such party, and the cause may proceed as if no decree had been made in the same against him. (Rev. 1877, p. 1190.)"

EXCERPT FROM RECORD IN DEWEY LAND CO. V. STEVENS.

IN CHANCERY OF NEW JERSEY.

Between
DEWEY LAND COMPANY, *et al.*, *Complainants*,
and
HENRY E. STEVENS, JR., *et al.*, *Defendants*.
} On Bill, etc.

TESTIMONY.

Transcript of testimony taken in the above-entitled cause, before HON. EDWIN ROBERT WALKER, Vice-Chancellor, at the Camden County Court House, on the second day of February, nineteen hundred and twelve, at eleven o'clock A. M.

APPEARANCES—GEORGE A. BOURGEOIS, ESQ., for the complainants; HARVEY F. CARR, ESQ., for the defendants.

Mr. Bourgeois: Mr. Carr is willing that the bill of complaint shall be amended, as follows, so that the bill will read:

After the words "bounded and described as follows," at the end of the first paragraph and before the word "beginning," interline the following:

> "Beginning at a point in the easterly line of New Hampshire Avenue, 240 feet southwesterly from Pacific Avenue, said point being the southeast corner of New Hampshire Avenue and Dewey Place; thence extending (1) eastwardly parallel with Pacific Avenue and along the south line of Dewey Place, 190 feet; thence southwardly parallel with New Hampshire Avenue to the high water-line of the Atlantic Ocean as it existed in 1852; thence (3) southerly along the high water-line of the Atlantic Ocean as it existed in 1852 to the easterly line of New Hampshire Avenue, extended; thence (4) northwardly along said line of New Hampshire Avenue to the place of beginning; conveyed to complainants by various deeds of conveyance."

Strike out the two paragraphs after the words in the first paragraph on the second page of said bill, which reads as follows: "In Book 313 of Deeds, page 363"—the part stricken out beginning as follows: "and that by reason of the 'as' " and ending "more or less to the place of beginning." All on page 2 of said bill.

Mr. Carr: That will make necessary an amendment to our answer, because a greater portion of the lands are now claimed by the complainants than were claimed in the original bill, and we want to make our answer cover the increased territory now claimed by the complainants; and I also want to add to our claim of title, which is based upon a riparian grant, a claim by accretions, as well as the riparian title.

Mr. Bourgeois: There is no objection to that. We will make the formal amendments later.

Mr. Bourgeois opens the case to the Court.

Mr. Bourgeois: I want first to offer in evidence a certified copy of a map of dedication of Atlantic City, and ask that it be marked Exhibit C1; this is a reproduction of it.

OPINION OF VICE-CHANCELLOR WALKER, DEWEY LAND CO. V. STEVENS.

Opinion of Vice-Chancellor Walker in Dewey Land Company against Stevens, pages 108, 109, 110, 111.

IN CHANCERY OF NEW JERSEY.

Between
DEWEY LAND COMPANY, *et als.*, *Complainants*,
and
HENRY E. STEVENS, JR., *et al*, *Defendants*.

On Bill, etc.

MEMORANDUM.

On final hearing on pleading and proofs.

MR. ROBERT H. INGERSOLL and MR. GEORGE A. BOURGEOIS, for complainants.

MESSRS. WILSON AND CARR, for defendants.

WALKER, *C.*

The bill in this cause is one to quiet title. The complainants acquired a lot of land in Atlantic City fronting upon the ocean, by deed dated December 19th, 1904. The southerly line of the lot bounded upon high-water line of the Atlantic Ocean.

The allegations of the complainants are, that by reason of accretions in front of their tract by alluvial deposits, the high-water line has been projected out into the ocean a considerable distance, and that, by the law of this State they are entitled to the land this made oceanward of the original high-water line. As a legal proposition this is correct. Ocean City Association v. Schriver, 64 N. J. L. (35 Vr.) 550. But, in this case title to part of the land thus made is claimed by the defendants in virtue of a riparian grant by the State, made June 28th, 1900, which antedates the complainant's conveyance.

New Hampshire Avenue in Atlantic City runs nearly north and south. On this avenue, on opposite sides and opposite to each other, are the lands of the complainants and defendants, those of the complainants on the easterly and those of the defendants on the westerly side. At the time of the riparian grant to the defendants' predecessors in title, June 28th, 1900, high-water mark in the Atlantic Ocean cut across New Hampshire Avenue and the adjacent lands, on both sides of the avenue, from northeast to southwest, which presented a shore front line in the Bartletts (predecessors in title of defendants) which passed southwestwardly instead of nearly westwardly, and which, extended from the southeasterly corner at right angles from the high-water line of May, 1900, as established by the riparian commissioners, ran obliquely to the southeast across the line of the complainant's premises, extended rectangularly in a southerly direc-

tion. This was the situation when the riparian commissioners made to the Bartletts the riparian grant, which extends out into the ocean, to an exterior line established by themselves.

Alluvial deposits have been made all along the ocean at the point in dispute, and have made fast land in front of the complainants' lot far oceanward of the high-water line to which their conveyance runs by metes and bounds, and which fast land is well within a large portion of the defendants' riparian grant, also now largely fast land by reason of accretions. That is to say, their lines now cross each other on the same fast land.

It should be remarked that a portion of the northeasterly line of the defendants' riparian grant crosses, and includes within it, a portion of the land conveyed by metes and bounds to the complainants by their deed above mentioned. This occurs by reason of the fact that when the riparian grant was made in 1900, that part of the land granted to the Bartletts, and which was within the lines of the complainants' description as just mentioned, was under water and therefore was the proper subject of a riparian grant. This was in 1900, but in 1904, when the complainants received their deed running to high-water line as a monument, the line had then extended a considerable distance eastward, and the westerly line of complainants' deed therefore intersects and runs over for a considerable distance the northeasterly line of the defendants' grant.

The jurisidictional facts of peaceable possession in complainants and no suit pending, are present.

The defendants admit that the complainants' claim of ownership of the lands made by accretions is disputed, and they deny that the complainants have any title thereto within the lines of the tract acquired from the Bartletts by deed dated April 25th,

1905 (which includes the riparian grant), and that such portion of the lands so conveyed as laid below the high-water line of the Atlantic Ocean as that line existed in May, 1900, was conveyed by the State to the Bartletts, under whom they claim, in the riparian grant of June 28th, 1900. In this position they are correct in point of fact, and are also entitled to prevail as matter of law.

As was held in Sooy Oyster Co. v. Gaskill, 69 Atl. Rep. 1084, on the question of the force and effect of a riparian grant:

> "Where plaintiff shows ownership under an absolute grant executed by the riparian commissioners, the complainant must be regarded as the undisputed owner of the *locus in quo*, for the grant is from the sovereign power, and is protected from collateral attack, except through false suggestions appearing on the fact of the grant; and the fact that the grant is void,—cannot be shown by affidavits, and the validity of complainant's grant on the ground stated can only be determined by a direct proceeding for that purpose brought in the name of the Attorney-General."

The case of Attorney-General v. Morris & Cummings Dredge Co., 64 N. J. Eq. (19 Dick.) 555; affirmed, 69 N. J. Eq. (3 Robb.) 829, is an illustration of such a proceeding as Vice-Chancellor Leaming mentions in Sooy Oyster Co. v. Gaskill. See also Attorney-General v. Sooy Oyster Co., 78 N. J. L. (49 Vr.) 394, at pp. 407-8 & 9.

The complainants' bill must be dismissed, with costs.

EXCERPTS FROM RIPARIAN STATUTES.

RIPARIAN RIGHTS.

Excerpts from the Riparian Rights, Statutes New Jersey, 4 Compiled Statutes of New Jersey, page 4382.

15. "Grant of lands under water, Sec. 8. That if any person or persons, corporation or corporations, or associations, shall desire to obtain a grant for lands under water which have not been improved, and are not authorized to be improved, under any grant or license protected by the provisions of this act, it shall be lawful for any two of the said commissioners concurring, together with the governor and attorney-general of the state, upon application to them, to designate what lands under water for which a grant is desired lie within the exterior lines, and to fix such price, reasonable compensation, or annual rentals for so much of said lands as lie below high water mark, as are to be included in the grant or lease for which such application shall be made, and to certify the boundaries, and the price, compensation or annual rentals to be paid for the same, under their hands, which shall be filed in the office of the secretary of state; and upon the payment of such price or compensation or annual rentals, or securing the same to be paid to the treasurer of this state, by such applicant, it shall be lawful for such applicant to apply to the commissioners for a conveyance, assuring to the grantee, his or her heirs and assigns, if to an individual, or to its successors and assigns, if to a corporation, the land under water so described in said certificate; and the said commissioners shall, in the name of the state, and under the great seal of the state, grant the

said lands in manner last aforesaid, and said conveyance shall be subscribed by the governor and attested by the attorney-general and secretary of state, and shall be prepared under the direction of the attorney-general, to whom the grantee shall pay the expense of such preparation, and upon the delivery of such conveyance, the grantee may reclaim, improve and appropriate to his and their own use, the lands contained and described in the said certificate; subject, however, to the regulations and provisions of the first and second sections of this act, and such lands shall thereupon vest in said applicant; provided, that no grant or license shall be granted to any other than a riparian proprietor, until six calendar months after the riparian proprietors shall have been personally notified in writing by the applicant for such grant or license, and shall have neglected to apply for the grant or license, and neglected to pay, or secured to be paid, the price that said commission shall have fixed; the notice in the case of a minor shall be given to the guardian, and in case of a corporation to any officer doing the duties incumbent upon president, secretary, treasurer or director, and in case of a non-resident, the notice may be by publication for four weeks successively in a daily newspaper published in Hudson County, and in a daily newspaper published in New York City (Rev. 1877, p. 984)."

20. "Grant to person other than riparian owner; rights of riparian owner; how extinguished; appeal. Sec. 13. That in any case where a grant of the lands of the state under water is made by the commissioners, to any person other than the riparian owner that the state's grantee shall not fill up or improve said lands under water until the rights and interest of the riparian owner in said lands under water (if any he has) shall be extinguished, as fol-

lows: the said commissioners shall fix the amount to be paid to said riparian owner for his rights and interest therein (if any he has), and said riparian owner shall have the right, within twenty days after he has been notified of said amount, to accept said sum in full extinguishment of all his rights, or if he is dissatisfied with said award he may apply to the Supreme Court at the next term thereafter for a struck jury to try the question in such place as may be designated by said Court, and said jury may increase or diminish the amount to be paid the said riparian owner, and their verdict shall be final as to said amount, and on the payment or tender by the state's grantee to the riparian owner of the amount fixed by said jury all the rights and interests of said riparian owner in the lands of the state under water in front of his land shall be extinguished; that the costs of the trial shall be paid as follows: if the verdict of the jury is greater than the award of the commissioners then the state shall pay the costs of the trial, if the verdict is the same as the award or less than the award of the commissioners then the riparian owner shall pay the costs (Rev. 1877, p. 985)."

21. "Riparian owners; application to commissioners for lease or conveyance. Sec. 1. That any riparian owner on tide waters in this state who is desirous to obtain a lease, grant or conveyance from the State of New Jersey of any lands under water in front of his lands, may apply to the commissioners, appointed under the act to which this is a supplement and the supplements thereto, who may make such lease, grant or conveyance with due regard to the interests of navigation, upon such compensation therefor, to be paid to the State of New Jersey, as shall be determined by said commissioners, which lease, conveyance or grant shall be

executed as directed in the act to which this is a supplement and the supplements thereto, and shall vest all the rights of the state in said lands in said lessee or grantee (Rev. 1877, p. 985)."

26. "Commissioners may fix purchase money or rentals for lands below tide water; conveyances. Sec. 1. That from and after the passage of this act it shall be lawful for the riparian commissioners, or any three of them therein concurring, together with the governor of this state, to fix and determine, within the limits prescribed by law, the price or purchase money, or annual rental to be paid by any applicant for so much of lands below high water mark, or lands formerly under tide water belonging to this state as may be described in any application therefor duly made according to law; and the said commissioners, or any three of them therein acting and concurring, with the approval of the governor, shall in the name and under the great seal of the state, grant or lease said lands to such applicant accordingly; and all such conveyances or leases shall be prepared by the said commissioners or their agents at the cost and expense of the grantee or lessee therein, and shall be subscribed by the governor, and at least three of said commissioners, and attested by the secretary of state (Rev. 1877, p. 986)."

39. "Sale or lease of lands below mean high water mark. Sec. 4. That the riparian commissioners, or a majority of them, together with the governor, shall not hereafter be required to give leases for lands of the state under water, convertible into grants upon payment of the principal sum mentioned therein, but may sell or let any of the lands of the state below mean high water mark, upon such terms as to purchase money or rental, and under such conditions and restrictions as to

time and manner of payment, the duration and removal of any lease, the occupation and use of the land sold or leased, and such other conditions and restrictions as the interest of the state may require, as may be fixed and determined by said riparian commissioners, or a majority of them, together with the governor (P. L. 1891, p. 215).

(Inconsistent laws repealed.)

Cited: Improvement Co. v. Railroad Co., 72 L. 137, 60 A. 44.

Preamble. Whereas, the Palisades situate in this state are liable to be irreparably injured or destroyed, unless measures be adopted for the preservation thereof; and whereas, by the insertion or imposition of proper and appropriate terms, conditions, restrictions and limitations in leases, grants and conveyances of the lands lying under water adjacent to or in front of the Palisades, the threatened injury or destruction thereof may, in a great degree, be averted."

No. 5[redacted]200

IN THE

UNITED STATES SUPREME COURT

October Term, 1921.

HENRY B. STEVENS, JR.,
Petitioner,

vs.

ARTHUR S. ARNOLD, ABRAM L. ERLANGER and REAL ESTATE TITLE INSURANCE AND TRUST COMPANY OF PHILADELPHIA, Executors, &c.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF OF ARTHUR S. ARNOLD, et al.

GEORGE A. BOURGEOIS and
HARRY R. COULOMB,
Attorneys for and of Counsel with Respondents.
ROBERT H. McCARTER,
Of Counsel.

Petition for Certiorari filed October 28, 1921.
Certiorari Return filed January 18, 1922.
([illegible])

[illegible]

No. 598.

IN THE

UNITED STATES SUPREME COURT

October Term, 1921.

HENRY E. STEVENS, JR.,
Petitioner,

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FACTS.

The defendants-in-error are the executors and trustees of Samuel F. Nirdlinger, the complaint below (who has died during the progress of the case). The bill of complaint was filed by him in the District Court of the United States for the District of New Jersey, with a two-fold aspect: first, under the New Jersey statute to quiet his title; and, second, under the general equitable jurisdiction of the Court to remove a cloud thereon. The premises in question border on the Atlantic Ocean at Atlantic

City, New Jersey, and are specifically described in paragraph 1 of the bill of complaint as amended (Record, p. 47).

The bill specifically alleges in accordance with the requirements of the statute (4 New Jersey Compiled Statutes, p. 5399):

(a) The complainant's possession of the *locus;*

(b) Under a claim of title or ownership; and

(c) The assertion of a claim to or interest in the same by the defendant Stevens;

and calls upon the defendant to assert and specify such claim and interest.

With reference to this feature of the bill, the defendant (Record, p. 12, pars. 4d and 4e) claims title to a part of the land described in the bill, admitting the complainant's ownership of the remainder, and that part so claimed, is shown by hatching on the following sketch adopted by the Court below (262 Fed. Rep. 595). The broken line has been added to display the boundaries of the entire tract. /3 8

The answer (p. 12) claims that the determination of a previous suit in the state courts of New Jersey (a copy of the record in which is attached to the answer) (p. 15), between Stevens and Nirdlinger and the Dewey Land Company, which has since conveyed its interest to Nirdlinger is *res adjudicata* of the question.

On the 9th of October, 1915, an amendment to the bill of complaint was permitted (p. 34), giving the chain of title of the complainant to the *locus,* and showing (p. 39) that the complainant has ever since he acquired the interest in the premises described by the deeds referred to, paid the taxes, assessments and other charges imposed thereon. There is no contradiction of this.

The second aspect of the bill is found in para-

graph 6 (p. 7) and paragraph 7 of the bill as amended (p. 33) and alleges briefly the obtaining of a grant by Stevens' grantors from the Riparian Commissioners of New Jersey of certain described property, including the *locus* shown on said sketch) and claiming that said grant was and is illegal and void for the reasons stated.

The answer denies these allegations (p. 14) and sets up a counter-claim to the *locus* in the nature of a cross-bill, seeking to have his alleged title to the premises confirmed and asking that the complainant be enjoined from continuing to assert title thereto.

To this counter-claim the complainant filed an answer (p. 41) taking issue thereon, and again setting up his claim of title.

Considerable evidence was taken and Judge *Haight* filed an opinion (p. 175), reported in 262 Fed. Rep. 591, in which every question is carefully considered, overruling the defense of *res adjudicata* and determining that the complainant is entitled to the premises, and that Stevens has no right to or interest therein. From the decree (p. 191) based upon that opinion an appeal was taken to the Circuit Court of Appeals for the Third Circuit, which unanimously affirmed the decision for the reasons given by Judge Haight (p. 223).

The case is here by *certiorari* from this Court, and will be discussed under the following heads: Res Adjudicata, Accretions, Riparian Grant and Quia Timet.

RES ADJUDICATA.

DEFENDANT, BY HIS PLEADING, HAS ESTOPPED HIMSELF FROM URGING THE PREVIOUS ADJUDICATION AS A BAR TO THIS SUIT.

Plaintiff's bill seeks to have his title to the *locus in quo* fixed and determined, pages 5 and 34. Defendant answered, page 9, and in addition thereto, pages 14 and 15, interposed a counter-claim in the nature of a cross-bill against the plaintiff, in which he prayed affirmative relief, claiming that complainant's title to that portion of the land embraced in the riparian grant, made by the State of New Jersey to Bartletts, and conveyed by Bartletts to myself (defendant) (to wit, the *locus in quo*), injuriously affects his title thereto, etc., and prays that it may be adjudicated in this suit that his title in said lands is paramount, etc., and prayed an answer without oath. To this counter-claim, plaintiff filed a reply, page 41, denying the allegations in said counter-claim, setting up title in plaintiff. The matter was fully heard by the Court upon this counter-claim of defendant's and plaintiff's answer thereto, and the Court determined that issue upon its merits.

Having submitted himself to the jurisdiction of the Court, and having prayed that the Court determine the matter, and the Court having determined it, defendant cannot, in the face of his pleadings, which is an admission against him, claim that the plaintiff is not entitled to the benefit of the adjudication in the present suit because of the trial thereof in the New Jersey Chancery Court.

Megrie v Doke 33 Cal 74

Seymour v Lucker 92 Pa St. 490-501

THE DECREE OF THE NEW JERSEY COURTS IN THE CASE OF DEWEY LAND CO. V. STEVENS IS NO BAR TO THIS SUIT.

About 1910 a bill to quiet title under the New Jersey statute was filed on behalf of Dewey Land Company and Nirdlinger against Stevens, who claimed title to the triangular tract of land in dispute. This bill was based upon a claim of accretions, alleging that the high-water mark had moved oceanward. The answer admitted that the high-water mark had moved outward but made no claim to the title by reason of accretions, and based his claim upon a riparian grant made by the State of New Jersey. After the filing of the answer, no claim being set up except under the riparian grant, the bill was amended eliminating the subject of accretions and setting up title under two quit-claim deeds extending into the ocean to the original high-water line of 1852. In this trial in chancery, a portion of the land described in defendant's answer, to wit, the *locus in quo* was shown to be hand above the high-water mark, to which the riparian grant could give no title. Upon final hearing the bill was dismissed, the Court of Chancery being of the opinion that the proceedings, to attack a riparian grant made by the State, must be in the name of the attorney-general of the State. An order was thereupon entered dismissing the bill in the following language:

> "This matter coming on to be heard on the second day of February, 1912, in the presence of Robert H. Ingersoll and George A. Bourgeois, of counsel with the complainants, and of Wilson & Carr, of counsel with the defendants, and the Court having heard and considered the

proofs and the arguments of respective counsel, and it appearing to the satisfaction of the Court that the complainants are not entitled to any relief whatsoever by reason of the matters and things in their bill of complaint contained and set forth, and that said bill ought to be dismissed with costs;

IT IS THEREUPON, on this seventh day of September, 1912, on motion of Wilson & Carr, solicitors for and of counsel with the defendants, ORDERED that the complainants' bill of complaint be and the same is hereby dismissed with costs.

IT IS FURTHER ORDERED that a fee of $150.00 be and the same is hereby allowed to the solicitors of the defendant, the same to be taxed as part of the costs of this suit and to be collectible therewith.

E. R. Walker,
C."

(Exhibit E, page 52.)

To this order dismissing the bill of complaint an appeal was prosecuted to the Court of Errors and Appeals, which Court held that the Court of Chancery erred in holding that the proceeding must be prosecuted by the attorney-general, and also held that complainants acquired no title by virtue of the two quit-claim deeds, mentioning the fact that the bill had been amended excluding the question of accretions from the case, and affirmed the decree of the Court of Chancery in the following language:

"This cause having been brought to a hearing on appeal from the Court of Chancery at the June Term, 1913, of this court, and Bourgeois & Coulomb, of counsel with the appellants, and Wilson & Carr, of counsel with the re-

spondents, having been heard, and the questions brought up by the said appeal having been duly considered;

IT IS, on this fifteenth day of June, 1914, ORDERED, ADJUDGED AND DECREED that the decree of the Court of Chancery, made on the seventh day of September, 1912, which is appealed from by the appellants, be and the same is hereby in all things affirmed with costs in this court, and in the Court of Chancery, to be paid by the appellants, and that the petition of appeal be dismissed." (Exhibit F, page 53.)

In the latter part of November, 1915, defendant realizing that the Court of Chancery had not determined the matter filed a petition in the Court of Chancery praying to have the decree of dismissal amended. The petition setting up the final decree in the Court of Chancery, and the decree of affirmance in the Court of Errors and Appeals, alleging that the complainant had no right, title or interest in the lands described, prayed that the final decree entered in the Court of Chancery be amended to read that the complainant had no title to the lands, and the defendant had, a copy of which petition is found on page 211. This petition was dismissed on an opinion by Vice-Chancellor Backes, which is reported in 96 Atl. Rep. at page 362, advising the dismissal of the petition to amend in the following language:

"Moreover, looking into the opinion of the Court of Errors and Appeals, in the present case, I find that the judgment of that Court, dismissing the bill, was rested entirely upon the untenability of the complainants' claim to title, and in no aspect was the defendant's title pretended to be examined and confirmed. In such

circumstances, this Court, in its determination of the cause, would not have awarded the relief the defendant now seeks on this motion."

The order being as follows:

"This matter coming on to be heard in the presence of Harvey F. Carr, Esq., for the motion, and George A. Bourgeois, Esq., contra, and the Court having heard and considered the arguments of counsel thereon, and being of the opinion that the motion should be denied;

IT IS, THEREFORE, on this thirteenth day of December, 1915, on motion of Bourgeois & Coulomb, solicitors for and of counsel with the complainants, ORDERED that the petition to amend the decree in said cause be and the same is hereby dismissed, and the motion denied with costs.

E. R. Walker,
C.

Respectfully advised
John H. Backes,
V. C."

Judge Haight's opinion was filed on December 26, 1919, and about the first of June, 1920, defendant made an effort to have the remittitur in the Court of Errors and Appeals amended so as to decree that complainant had no title but that defendant had title to the *locus* and gave notice of a motion before the Court of Errors and Appeals to amend the remittitur filed in the case of Dewey Land Company, et als., v. Stevens, which notice was in the following language:

"To Bourgeois & Coulomb, Esquires,
Solicitors for Complainants-Appellants.
Take notice that we shall apply to the Court

of Errors and Appeals on Tuesday, the fifteenth day of June, nineteen hundred and twenty, at eleven A. M., on said day, or as soon thereafter as counsel can be heard thereon, at the State House in the City of Trenton, for an order amending the remittitur heretofore entered herein, so as to make the remittitur comply with the opinion of this Court, and so as to direct the Court of Chancery to enter a decree adjudging that the complainants have no estate, interest in, or encumbrance upon any of the lands hereinafter particularly described, and so far as relates to any claim thereon by or on behalf of the above-named complainants, the title of the defendants in and to the same and every part thereof is hereby determined, fixed and settled, and declared to be good; and for such further and other order as may be necessary to make the remittitur fully comply with the opinion of the court.

DESCRIPTION OF LANDS REFERRED TO.

ALL those certain tracts or parcels of land and premises situate in the City of Atlantic City, County of Atlantic and State of New Jersey, bounded and described as follows:

Tract No. 1. BEGINNING at the intersection of the fourth course of the description contained in the riparian grant from the State of New Jersey by Foster M. Voorhees, Governor, Willard C. Fisk, William Kloke, John I. Holt, and John J. Farrell, Riparian Commissioners, to William B. Bartlett and Elwood S. Bartlett, bearing date the 28th day of June, 1900, recorded in the office of the Riparian Commissioners of the State of New Jersey in Liber N, Folio 245, etc., also in the office of the Clerk of Atlantic County, New Jersey, in Book 248 of

Deeds, page 475, etc., with the easterly line of New Hampshire Avenue; thence southeasterly in and along the said fourth course of said deed to the high-water mark of the Atlantic Ocean; thence southwesterly in and along the high-water mark of the Atlantic Ocean to the easterly line of New Hampshire Avenue; thence northerly in and along the easterly line of New Hampshire Avenue to the place of beginning.

Tract No. 2. BEGINNING at a point where the high-water mark of the Atlantic Ocean intersects the fourth course of the description in the riparian grant from the State of New Jersey by Foster M. Voorhees, Governor, Willard C. Fisk, William Kloke, John I. Holt and John J. Farrell, Riparian Commissioners, to William H. Bartlett and Elwood S. Bartlett, bearing date the 28th day of June, 1900, recorded in the office of the Riparian Commissioners of the State of New Jersey in Liber N, Folio 245, etc., also in the office of the Clerk of Atlantic County, New Jersey, in Book 248 of Deeds, page 475, etc., thence southeasterly in and along the said fourth course to the exterior line established by the Riparian Commissioners; thence westerly along the said exterior line curving to the right on a radius of 4000 feet to where the said exterior line intersects the extended easterly line of New Hampshire Avenue; thence northerly in and along the said extended easterly line of New Hampshire Avenue to the high-water mark of the Atlantic Ocean; thence easterly along the said high-water mark to the place of beginning.

Wilson & Carr
Solicitors for Defendants-
Respondents."

The application was denied, the Court entering the following order:

"This matter being opened to the Court by Harvey F. Carr, of the firm of Wilson & Carr, of Counsel with the defendants, in the presence of Bourgeois & Coulomb, and Robert H. McCarter, Esq., of Counsel with the complainants; and it appearing that notice was duly served of an application to amend the remittitur entered in the above stated cause at the June Term, 1913, so as to direct the Court of Chancery to enter a decree adjudging that the complainants have no estate, interest in or encumbrance upon any of the lands hereinafter particularly described, and so far as relates to any claim thereon by or on behalf of the above named defendants the title of the defendants in and to the same and every part thereof is hereby determined, fixed, settled and declared good; and for such further and other order as may be necessary to make the remittitur fully comply with the opinion of the court.

DESCRIPTION OF LANDS REFERRED TO:

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sioners of the State of New Jersey in Liber N, Folio 245 &c., also in the office of the Clerk of Atlantic County, New Jersey, in Book 248 of Deeds, page 475 &c., with the easterly line of New Hampshire Avenue; thence southeasterly in and along the said fourth course of said deed to the high-water mark of the Atlantic Ocean; thence southwesterly in and along the said high-water mark of the Atlantic Ocean to the easterly line of New Hampshire Avenue; thence northerly in and along the easterly line of New Hampshire Avenue to the place of beginning.

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And the Court being of the opinion that defendants are not entitled to have such amendment, the same is, on the fifteenth day of June, A. D. 1920, denied.

Entered this twenty-sixth day of June, A. D. 1920, on motion of

Bourgeois & Coulomb,
Solicitors for Complainants."

We shall now proceed to demonstrate that there has been no adjudication upon the merits of the questions here involved, for of course we recognize the fact that were the situation otherwise, the complainant would be foreclosed from seeking a reconsideration of the questions.

In order intelligently to comprehend the exact force and effect of the decree in the other suit which is relied on by the defendant herein, it is necessary to consider the character of the other suit. It was a proceeding commenced, conducted and concluded under the New Jersey statute (4 C. S. of New Jersey, page 5399) entitled "An act to compel the determination of claims to real estate in certain cases and to quiet title to the same." The object of this act, which is analogous to but not identical with acts having a similar purpose prevailing in other States, is to enable a person *in the undisputed possession of land and claiming to own the same* to compel another who claims to have some interest in or lien upon such lands to assert such claim, the theory being that without this remedy the position of such a possessor of land is both embarrassing and remediless. He cannot eject, for he is in possession, and so the statute enables him to require the claimant to fly his flag. The whole proceeding is statutory and the statute defines what the bill shall allege; what shall occur if the defendant makes or abandons his

claim; or if, on the other hand, he relies thereon how he shall specify it; and in either of these events what decree shall be entered, if a proper case is presented.

In suits of this character it has been frequently held that the burden of proving the adverse claims whose validity is thus called into question is upon the defendant asserting it and that the normal position of the parties complainant and defendant in an equity suit is reversed, the defendant sustaining the burden of proof. *Ocean View Land Company v. Loudenslager*, 78 N. J. Eq. 572; *Beale v. Black*, 45 Id. 668; *McCullough v. Absecon Beach & Land Co.*, 48 Id. 170.

In the case of *Chandley v. Robinson*, 75 Atl. Rep. 180, which was a bill filed under this act, Vice-Chancellor Garrison held:

> "The bill having charged and the answer of the defendant having conceded that the complainants at the time of the filing of the bill *were in peaceable possession of the land in question, claiming to own the same*, the burden is then upon the answering defendant to set up and prove such title in himself as he claims he has."

In *Fittichauer v. Metropolitan Fireproofing Co.*, 70 N. J. Eq. 429-430, Vice-Chancellor Stevenson, speaking of this statute, says:

> "The point to be kept in mind in examining this peculiar statute is that its main object is expressed in the first clause of its title, viz., to compel the *determination* of claims to real estate in certain cases. The 'certain cases' are those cases of hardship where the defendant out of possession makes a claim while the complainant in possession has no means of compelling the defendant, either at law or in equity,

to submit his claim for determination, and thus have it either established as valid or finally declared void. The great object of the statute is not to afford the complainant a new means of asserting and establishing his title, but to afford the complainant a means of compelling the defendant to either abandon or establish his title, or have it decreed invalid. * * *

"I think that great confusion has been made by this persistent effort of the complainant to state unnecessarily in his bill the claim which the defendant has made or is 'reputed' to have in respect of the land in question. If the complainant prove the jurisdictional facts the result is that the defendant is called upon *affirmatively to set forth and maintain by proofs* any adverse title or claim which he holds. The pleading of the defendant, if it sets forth a legal title, may be in effect a declaration in ejectment and if it sets forth an equitable title, it may be in effect a bill in chancery. This complainant is under no obligation even to exhibit his own title after the defendant has shown title. All that the complainant is obliged to show in the first instance is that he is in peaceable possession, and that no suit is pending in which the defendant's claim, whatever it may be, may be tested, and also, that he, the complainant, is unable to bring an action at law in which the test can be applied, Jersey City v. Lembeck, *supra,* and also, I think, that he, the complainant, is unable, except under the statute, to bring any suit in equity in which such test can be applied." * * *

He further states:

"If the affirmative pleading of the defendant which the statute prescribes sets forth a legal

claim, and neither party applies for an issue at law, or if such affirmative pleadings sets forth an equitable claim, then the court of chancery is to proceed with the suit on the part of the defendant which it thus brought. The statute leaves no doubt as to the course of procedure. It provides that: 'When such issue is not requested or as to the facts for which the same is not requested, the court of chancery shall proceed to inquire into and determine such claims, interest and estate according to the course and practice of that court.' What is the 'course and practice' of a court of equity where a party comes forward as the actor asserting affirmatively his title or interest in real estate for the purpose of having such title or interest determined? The complainant, as we have seen, is not obliged to exhibit his own title in his bill, and ought not, in my opinion, notwithstanding the practice which has prevailed, to unnecessarily undertake to set forth in detail the defendant's claim. A court of equity, 'according to the course and practice' which courts of equity have uniformly followed, ought to require the complainant to file a pleading joining issue with the defendant. It is immaterial whether this pleading be called a special replication, a statement (see rule 221 regulating interpleader suits) or a bill of particulars. Where the defendant sets forth an equitable claim, in large numbers of cases the pleading of the complainant in reply thereto would be in effect an answer to a bill in chancery."

He adds:

"I strongly incline to think that it is bad practice for the complainant to undertake to

> specify the character, nature or extent of the claim of any of the defendants. Such practice is inconsistent with the fundamental theory of this statute, which is that the complainant is to compel the defendant affirmatively to *set forth and maintain* his own claim and to allow the defendant to set up any title or claim which he sees fit to set up."

If, upon the assertion of such a claim, the parties desire it, they are, by the fifth section, entitled to have an issue framed to have a jury pass upon the matter and in such a case the defendant is made the plaintiff in the issue, except when the proceeding is under an amendment to the act which in case of wild and unimproved lands permits the filing of a bill by the complainant without the assertion or proof of possession. *McGrath v. Norcross*, 73 N. J. Eq. 274.

There are three preliminary questions that constitute a *sine qua non* to the right of the plaintiffs successfully to prosecute such a suit and to require the defendant to disclose and assert his claim to the plaintiff, namely (a) that the plaintiff is in the peaceable possession of the *locus in quo;* (b) that he claims to own the same; and (c) that no suit is pending to enforce or test the validity of the defendant's claim. *Blakeman v. Bourgeois*, 59 N. J. Eq. 473; and these questions being jurisdictional facts, if denied, must be settled as a preliminary question. *Steelman v. Blackman*, 72 N. J. Eq. 330.

In the case of *Claron v. Thommessen*, which was a suit to quiet title under the statutes, filed in the New Jersey Court of Chancery, and determined on September 20th, 1922, the Court found that the bill of complaint should not have been filed under the statute to quiet title, and dismissed the bill, on the authority of *VanClave v. MacGregor* (72 Eq. 218). The

Claron case was carried to the Court of Errors and Appeals, and the decree of the Court of Chancery affirmed at the March Term of that court, 1923. As yet unreported.

The appellant studiously and persistently refuses to recognize the important element of a claim of ownership on the part of the plaintiff in a suit of this character.

> "And this notwithstanding the statements from various opinions of the Court of last resort of New Jersey cited by him on page 12 of his brief in this court. For example, note the quotation from the opinion of the Court of Errors and Appeals in *Ocean View Land Company v. Loudenslager,* 78 N. J. Equity, 571:
>
> "Where, under a bill to quiet title (Gen. Stat. p. 3486), the complainant has established, to the satisfaction of the Court of Chancery, that he is in peaceable possession of the lands described in his bill of complaint *claiming to own the same,* and that his title is denied or disputed, and no suit is pending to test the validity of such hostile claim, the burden of establishing such adverse claim is upon the person setting it up, in which case the Court of Chancery may order that, in a feigned issue, framed to test the validity of such claim, the defendant, or party setting it up, sustains the issue as plaintiff."
>
> "The purpose of the act is to relieve, not persons who have the power to test the hostile claim by a direct proceeding in the usual mode, but to aid persons whose situation afford them no such opportunity. * * * It lends its aid to one in peaceable possession *under claim of ownership* to compel an adverse claimant to establish his claim; he may do so in equity or at law, but

in either case he is asserting a hostile claim against one in peaceable possession, which he must proceed to establish or abandon."

The statute is perfectly plain upon the subject that the plaintiff must not only allege possession, but that he is there under a claim of ownership. In *Stark v. Starrs,* 6 Wall. 402-410, the Court said:

"We do not, however, understand that the mere naked possession of the plaintiff is sufficient to authorize him to institute the suit, and require an exhibition of the estate of the adverse claimant, though the language of the statute is that 'any person in possession, by himself or his tenant, may maintain' the suit. His possession must be accompanied with a claim of right, that is, must be founded upon title, legal or equitable, and such claim or title must be exhibited by the proofs, and, perhaps, in the pleadings also, before the adverse claimant can be required to produce the evidence upon which he rests his claim of an adverse estate or interest."

Perhaps some confusion exists in the New Jersey cases upon this feature of the jurisdictional pre-requisites because of the oft repeated statement by our equity Judges that it is unnecessary for the plaintiff in a bill of this character to set out the sources of his title entitling him to make his claim of ownership. In the opinion of Vice-Chancellor Stevenson in the case above quoted (*Fittichauer v. Metropolitan Fireproofing Company*) he doubts the propriety of making such a disclosure, indicating that in his opinion the preliminary pre-requisite is sufficiently stated by the naked averment of a claim on the part of the plaintiff to own the property of which he is in possession. In the Dewey Land case the plaintiff,

whether necessarily or not, set out in his amended bill, omitting the accretions, the Leeds' and McClees' deeds as the basis of his claim of ownership. Having done this, perhaps unnecessarily, the Court inspected them and found that the claim of ownership by reason thereof was altogether frivolous as the quit-claim deeds conveyed no title whatever.

If there is no question raised as to these jurisdictional pre-requisites the statute then imposes upon the defendant the duty either to disclaim or to assert his claim, in which latter event the fifth section imposes upon the Court the duty to

> "Finally settle and adjudge whether the defendant has any estate, interest or right in, or encumbrance upon the said lands or any part thereof, and what such interest, estate, right or encumbrance is, and in or upon what part of said lands the same exists."

In the case at bar, the jurisdictional facts not being in issue, the defendant at the outset of the hearing, assumed the burden and offered his proofs (p. 87).

The next section (6) characterizes the effect of such determination as follows:

> "The final determination and decree in such suit shall fix and settle the rights of the parties in said lands, and the same shall be binding and conclusive on all parties to the suit."

This being the function and object of the suit and the duty of the Court in the premises, suppose, for any reason, the Court is unable to reach a determination; what must happen to the suit? Obviously the bill must be dismissed. This is exactly what occurred in *Steelman v. Blackman, supra,* but no one would have the hardihood to contend that the com-

plainant in that suit, having later acquired peaceable possession of the land under a claim of ownership could not have filed a bill and required a meritorious decision. Another example is *Oberon Land Company v. Dunn,* 60 N. J. Eq. 280, where, pending the trial (here an issue of law was had as permitted by the statute) it transpired that both the complainant and defendant had parted with their respective interests in the *locus in quo,* and the Vice-Chancellor said:

> "In the admitted present condition of this controversy each party has by deed parted with all interest in the subject-matter of the suit. Their grantee is a stranger who cannot be bound by any decree made therein. By the statute the decree 'shall fix and settle the rights of the parties in the said lands,' &c. Gen. Stat. p. 3487, Sec. 6. But the undisputed proof is that neither party has any rights in any of the said lands to be bound by any decree.
>
> "The suggestion for further proceedings on this bill to quiet title, which, so far as the parties to the suit are concerned, is already quieted by their own acts, is an invitation to the Court to hear argument upon a purely hypothetical question and to make a decree which will be wholly inoperative. That is not the purpose for which courts hear causes. The parties have themselves, in a binding way, settled the whole controversy.
>
> "No question of costs even remains to be decided. It is well established that where the parties settle their differences out of court without reference to the costs, each party shall pay his own costs. Bruce v. Gale, 2 Beas. 211, and cases there cited.

> "The bill of complaint and proceedings thereon should be dismissed, without costs allowed to either party against the other."

The record in the earlier suit discloses (page 15) that the complainants filed their original bill setting up their possession of an original tract of land and claiming that by accretions thereto they had become entitled to and were in possession of the accreted territory, which they particularly described, possession of which under a claim of ownership by accretions as aforesaid they averred in themselves and then asserted that the defendant had some claim or interest therein which they called upon him to assert and as to which they asked the judgment of the Court. This bill was later amended (page 18) in which their possession was again asserted of the same territory but their claim of ownership thereof, instead of having been asserted to arise by reason of accretions was based wholly upon two deeds which they had obtained from former owners, being deed from John McClees dated November 1st, 1911 (two years after the filing of the original bill) and the other from Horace M. Leeds dated the first of February, 1912. The amended bill, after reciting these two deeds averred:

> "That the said deeds are in your orators' possession, and ready to be produced and proved as may be directed; *and that your orators have ever since the recording of said deeds respectively, been in the peaceable possession of the land therein and above described,* and that at the time of purchasing said lands, and taking said deeds, your orators believed and yet believe that they and each of them bought and acquired a good title to said lands, and of the said equal undivided one-half part

thereof, and they have always claimed, and do now claim to own the same accordingly."

These undisputed facts are the foundation for the statement in the opinion of Mr. Justice Swayze in the other case, 83 N. J. Eq. 314:

> "The bill heretofore filed claimed title by accretion. This claim was abandoned and, by an amended bill, the complainants set up title by deeds from former owners."

Before this amendment to the bill was made, the land was described as extending to the high water line, thence to the exterior line established by the Riparian Commissioners. The defendant had filed his answer to the original bill, p. 22, setting up title to a portion of the land above high water mark, which constitutes the *locus in quo,* as well as land under water, under a riparian grant, and not otherwise, stating paragraph 2:

> "This defendant admits that the shore line of the said tract of land has been extended by alluvial deposits and that the high-water line of the Atlantic Ocean has been carried out, but as to the exact extent thereof this defendant is ignorant and leaves complainant to prove the same,"

and when the case came on for hearing no other or further answer was filed to the amended bill. The statute requires no reply on behalf of the complainant to the answer and so none was filed.

The issues, as thus framed, came on for hearing before the Court, testimony was taken, and the Court filed a short, unreported memorandum directing that the bill be dismissed, following, as he supposed, the case of *Sooy Oyster Company v. Gaskill,* 69 Atlantic Rep. 1084, to the effect that as the defen-

dant claimed title to the *locus* under a riparian grant from the State, it was impossible to attack that grant in a collateral proceeding which the Court deemed it was the plaintiff's effort to do. In the case last referred to Vice-Chancellor Leaming, on an application for injunction to restrain certain oystermen from taking oysters from land granted to the defendant by the riparian commissioners, in advising a decree in favor of the company said:

> "I cannot refrain from expressing a regret that I am compelled to arrive at the conclusion stated. The affidavits filed disclose that the land in controversy is probably natural oyster beds, and as such is land which the riparian commissioners had no power to convey. Defendants desire to adjudicate upon the validity of the grant, and I regret my inability to afford them such an adjudication in this case. If complainant's title is to be adjudicated, it must be by a direct proceeding in the name of the attorney-general, and I entertain no doubt but that if defendants will cause the data now before this court to be properly placed before the attorney-general, accompanied with a bond to secure the State against costs, leave will be granted for the necessary proceedings to raise the issue sought."

This is the case to which the Court of Chancery referred in dismissing the bill in the Dewey Land case.

The question of accretions as a basis for the complainant's claim of title having been eliminated, and the Vice-Chancellor, evidently, being of opinion that the quit-claim deeds conveyed no title in the upland to the complainant because the testimony showed that the land was the result of accretions, in view of the well-settled rule hereafter referred to in this

brief of the ambulatory character of a riparian grant; and being, apparently, further of the opinion that as to the lands under water the complainant could not maintain his suit in his individual name, but must seek the name and aid of the attorney-general, dismissed the bill, whereupon the decree already quoted, reciting that the complainants appearing not to be entitled to any relief by reason of the matters and things in the bill of complaint contained (i. e. having no right to attack as an individual the riparian grant under which alone the defendant claimed), it was ordered that the bill be dismissed. No mention was made concerning plaintiff's claim of title, nor was it considered.

The complainants then appealed and the Court of Errors delivered two opinions, that by Mr. Justice Swayze, 83 N. J. Eq. 314, and one by Judge White, Id. page 656. The result of this appeal was an affirmance of Vice-Chancellor Walker's decree but not for the reasons set forth in the Vice-Chancellor's memorandum. On the contrary, the Court was unanimously of the view that there were circumstances that permit complainants to question the validity of the title asserted by defendants under a riparian grant, and that the present case was not within the reason of the cases cited and relied upon by the Vice-Chancellor to prevent what he called a collateral attack upon a riparian grant. Justice Swayze's opinion, after showing the original title to all of the territory surrounding the *locus* and the fact that the complainants had acquired the Leeds and McClees deeds to the *locus*, and taking pains to state

> "Inasmuch as all claim by accretion is waived the complainants amended bill must fall unless they acquire title from the Leeds heirs or McClees,"

reached the conclusion that as the title thus derived is no title whatever, the complainants' bill must be dismissed, obviously upon the basis of a failure of the necessary jurisdictional pre-requisite of a claim not only a possession but of a claim of ownership. Thereupon the original decree of affirmance hereinabove quoted was entered. It is perfectly obvious that no adjudication whatever has yet been made upon the validity of the defendants' claim to the *locus in quo*—the only object of the New Jersey suit —and hence we contend that upon familiar and fundamental principles the defense of *res adjudicata* is unavailable. Attention in this brief has already been directed to the fact that the defendants, in evident appreciation of this idea, and long after they filed their answer in this suit, applied to the Court of Chancery for leave to amend the decree in the other suit so that it would, on its face, purport to have disposed meritoriously of the question. This application, as we have seen, was denied by the Court of Chancery; and after Judge Haight wrote his opinion in the case at bar, a similar application was made, as we have already seen, to the Court of Errors and Appeals, to amend its decree in the old case, but without avail. The Court of Errors and Appeals, in the earlier case, realizing that the defendant's riparian grant gave him no title to the land above the high-water mark, declined to decree that the defendant had title thereto, and, speaking of the *locus in quo* said:

> "If the land belonged to the State at the time of the grant by reason of then being under tide water but has reverted to its former owners by matters arising after the grant, the complainants are not in the position of questioning the grant but of conceding its validity and claiming

> that the title thereby granted has ceased to be effective."

That language is inconsistent with any notion of a final determination of title to these accreted lands adverse to the complainant. The Court of Errors did hold that as to the lands under water covered by the riparian grant, and as to which complainant holds only quit-claim deeds from the heirs of McClees and Leeds, the complainant derived no title thereby and that as to the lands under water complainant had no other title because the deeds from the Atlantic City Beach Front Improvement Company, by the terms thereof, stop at the high-water mark, and hence, concluding that the complainants essential jurisdictional averment that it was in possession of the land under a claim of title, was untrue, dismissed the bill. All that the New Jersey Court of Errors and Appeals undertook to decide and did decide (beyond expressing their disapproval of the Vice-Chancellor's view that under no circumstances could the riparian grant be collaterally attacked) was that the complainant did not have a good title by virtue of the Leeds and McClees deeds set out in the amended bill. The decree of affirmance of the dismissal of the bill by the Court of Chancery was intentional. The Judges of that court are thoroughly familiar with the provisions of the act under which that bill was filed; they knew that when a case comes before them if it is ripe for determination the statute requires them to determine the rights of the parties therein, and inasmuch as the case went off upon a lack of jurisdiction the decree of affirmance of the dismissal of the bill in Chancery was no oversight but plainly and obviously correct.

It is well known that the Court of Errors and Ap-

peals of our State has no original jurisdiction and was without power in law to fix and determine by decree the rights of the parties to the *locus in quo*. Its authority was only to affirm, reverse or send the cause back with the direction that the Court of Chancery should render a decree in accordance with the opinion of the Court of Errors and Appeals. *New Jersey Franklinite Co. v. Ames*, 12 N. J. Eq. 507; *Black v. Del. & Raritan*, 24 N. J. Eq. 455-482.

Its affirmance of the decree in the Court of Chancery of a dismissal of the bill, when considered in connection with the statute requiring the Court to fix and determine the rights of the parties in the land, had only such effect as a non-suit would have had at common law, because if the Court of Errors and Appeals had intended to fix the rights of the parties to the lands in question, it would have remitted the record to the Court of Chancery with a direction to enter such decree as it indicated, and would not have simply affirmed the dismissal of the Court below.

In the case of *Blatchford v. Conover*, 40 N. J. Eq. 205-218, our Court of Errors and Appeals, speaking by Mr. Justice Depue, said:

> "The complainant's bill having been filed under the act to compel the determination of claims to real estate in certain cases and to quiet the title to the same, the decree in this suit must fix and settle the rights of the parties in the premises. So much of the decree appealed from as determines that Conover's title is superior to that of Blatchford's should be reversed and a decree be entered declaring Blatchford's title under his deed superior to that of Conover's under his sheriff's deed, with costs to be taxed against the complainant."

The riparian grant to Stevens was made under the Act of 1871 (4 N. J. Compiled Statutes, p. 4383), and in language is precisely similar to the grant made in the leading case of *Polhemus v. Bateman*, 60 N. J. Law, 163-167, wherein it was held that a riparian grant under the Act of 1871, confers upon the grantee only the *right to reclaim the lands under water and that until the lands have been reclaimed the grantee has no exclusive rights therein.*

In the case above mentioned the Court said:

> "So it may be admitted that the deed to Bateman under the Act of 1871, in the absence of any language limiting its operation and effect, would have passed to him all the rights of the State in the lands under water, but the deed contains the proviso that he is to have the right, liberty, privilege and franchise of excluding the tide water from so much of the land as lies under tide water by filling in or otherwise improving the same, and to appropriate the lands to his exclusive use. This language restricts the grant, and nothing in excess of it passes to the grantee. His rights under it must be interpreted by the words of the conveyance. He may fill in and otherwise improve the same and appropriate the lands so improved to his exclusive use. If he is permitted to appropriate the lands to his exclusive private use without filling in or improving, no effect is given to the previous language, and the deed will be given the same effect as if it contained only the proviso that he could appropriate the lands to his own exclusive private use. Such a construction of the deed, under the well-settled rules of interpretation, is inadmissible. The State made the grant and Bateman accepted it in this form, and it cannot

> be enlarged beyond the clear meaning of the words used. Bateman acquired no title to the exclusive use of any portion of the land under water until he filled in and reclaimed or improved it. The grant was only for the purpose of reclamation."

Under these circumstances, what final decree, if any, could have been made in favor of the defendant? He was not entitled to the upland by virtue of his riparian grant, and he was not entitled to any exclusive use of the land under water. He could only become entitled to such exclusive use of the land under water by reclaiming it, which he had not done, but which as to the land then under water he might do in the future. The Court could not have decreed that he was vested with the title to the land under water because he would not become so entitled until reclamation, and he might never reclaim. The Court could not decree that he had no rights in the lands under water because he had the right of future reclamation. So that as to the land above high water, he had no rights whatever, and as to the lands under water he had only a contingent interest, which accounts for the affirmance of the decree of dismissal.

The sixth section of the Act To Quiet Titles provides that the final determination and decree in such suit shall fix and settle the rights of the parties in said lands, and it is respectfully submitted that no decree in a case under the statute which fails to fix and determine the title of the parties in the lands is a final decree. In other words, under this statute the parties can litigate and re-litigate until the Court by its final decree *fixes and determines the rights* of the parties in the lands.

In Section 682 of *Black on Judgments,* the law is stated:

"A verdict without a judgment entered thereon is of no validity either as an estoppel or as evidence."

In this case the decree of the Court of Errors and Appeals did not attempt to fix or determine the rights of the parties in the *locus in quo*. It ordered, adjudged and decreed that the decree of the Court of Chancery made on the 7th day of September, 1912, which is appealed from by the appellants, be and the same is hereby in all things affirmed with costs in this suit and the Court of Chancery to be paid by the appellants, and that the petition of appeal be dismissed.

The principle underlying the plea of *res adjudicata* is familiar. In *Hughes v. The United States*, 4 Wall. 232, Mr. Justice Field in referring to a claim that the disposition of a previous action constituted the present suit *res adjudicata* said:

"The second case was a petitory action, brought by Sewall and Hudson, claimants under Goodbee, having for its object the vacation of the patent, the annulment of the above judgment against Sewall, then pending on appeal in the Supreme Court of the State, the recovery of damages, and the obtaining of an injunction. No judgment was passed upon the merits of any matter alleged. The petition was dismissed for want of jurisdiction and the absence of proper parties, so far as it related to the special relief sought by this suit—the vacation and surrender of the patent—and it was dismissed generally on the ground that it was 'defective, uncertain, and insufficient in the statement of the cause of action.'

"It requires no argument to show that judgments like these are no bar to the present suit.

> In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, it was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to, another suit."

In *Smith v. McNeal,* 109 U. S. 426, a suit had been begun for the recovery of the land which had been dismissed for want of jurisdiction by reason of the omission in the pleadings of a jurisdictional fact, and the question arose as to the effect of that dismissal upon the present action. Mr. Justice Woods, after citing *Hughes United States, supra,* and *Walden v. Bodley,* 12 Peters, 156, in which the Supreme Court said:

> "A decree dismissing a bill generally may be set up in bar of a second bill having the same object in view, but when the bill has been dismissed on the ground that the Court had no jurisdiction, *which shows that the merits were not heard, the dismissal is not a bar to the second suit."*

says:

> "The cases would seem to settle the question against the defendant-in-error for they decide that the dismissal of a suit for want of jurisdiction is upon a ground not concluding the right of action."

In *Vicksburg v. Henson,* 231 U. S. 259-269, the Supreme Court said:

> "It is well settled, however, that a decree is to be construed with reference to the issues it was meant to decide. Graham v. Railroad Company, 3 Wall. 704, 710; Reynolds v. Stockton, 140 U. S. 254; Vicksburg v. Vicksburg Water Works Co., 206 U. S. 496, 507; Haskell v. Kansas Natural Gas Co., 224 U. S. 217, 223; In Barnes v. Chicago, M. & St. P. Ry. Co., 122 U. S. 1, this court, speaking by Mr. Chief Justice Waite, said (p. 14):
>
> " 'Every decree in a suit in equity must be considered in connection with the pleadings, and, if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided.' "

Inasmuch as the land in dispute is above the high water line, and the answer of defendant in the previous case limited its scope to land under the riparian deed, which gave the right of reclamation only, which had not been exercised, and admitted that the high water line had been carried out, thus leaving the *locus in quo* above the high water line, the subject matter of defendant's answer was different from the subject-matter in this suit.

Inasmuch as the decree in the other suit was a dismissal of the complainant's bill without determining the rights of any of the parties in the controversy those rights still remain undetermined. It is apparent, therefore, that the record in decree in the New Jersey suit is no more effective as an estoppel or as *res adjudicata* against the present complainants, who have since acquired the title of the

Dewey Land Company to the *locus in quo* than the decree dismissing the bill in the case of the *Oberon Land Company v. Dunn, supra,* where, *pendente lite,* the parties complainant and defendant had sold out their respective interests in the *locus in quo.*

The conclusion of the opinion of Justice Swayze, 83 N. J. Eq. 317, was

> "We think the complainants fail to establish the title set up in the amended bill; the decree of dismissal must, therefore, be affirmed with costs."

It is, however, urged that the complainant in the other case might have relied upon his title by accretions as a basis or foundation for his suit. The answer to this claim, however, is obvious. A judgment or decree is *res adjudicata* or conclusive upon a matter that might have been litigated as well as one that was litigated *only in situations where the cause of action is the same.* The leading case making this distinction is *Cromwell v. The County of Sac,* 94 U. S. 351, where Mr. Justice Field said:

> "The questions presented for our determination relate to the operation of this judgment as an estoppel against the prosecution of the present action, and the admissibility of the evidence to connect the present plaintiff with the former action as a real party in interest.
>
> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered

upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defense actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defense were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one

cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action.

"The difference in the operation of a judgment in the two classes of cases mentioned is seen through all the leading adjudications upon the doctrine of estoppel. Thus, in the case of Outram v. Morewood, 3 East. 346, the defendants were held estopped from averring title to a mine, in an action of trespass for digging coal from it, because, in a previous action for a similar trespass, they had set up the same title, and it had been determined against them. In commenting upon a decision cited in that case, Lord Ellenbrough, in his elaborate opinion, said: 'It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery of itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which, having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue, solemnly found against them.' And in the case of Gardner v. Buckbee, 3 Cowen, 120, it was held by the Supreme Court of New York, that a verdict and judgment in the Marine Court of the City of New York, upon one of two notes given upon a sale of a vessel, that the sale was fraudulent, the vessel being at the time unseaworthy, were con-

clusive upon the question of the character of the sale in an action upon the other note between the same parties in the Court of Common Pleas. The rule laid down in the celebrated opinion in the case of the Duchess of Kingston was cited, and followed: 'That the judgment of a court of concurrent jurisdiction directly upon the point is as a plea at bar, or as evidence conclusive between the same parties upon the same matter directly in question in another court.'

"These cases, usually cited in support of the doctrine that the determination of a question directly involved in one action is conclusive as to that question in a second suit between the same parties upon a different cause of action, negative the proposition that the estoppel can extend beyond the point actually litigated and determined. The argument in these cases, that a particular point was necessarily involved in the finding in the original action, proceeded upon the theory that, if not thus involved, the judgment would be inoperative as an estoppel. In the case of Miles v. Caldwell, reported in the 2nd of Wallace, a judgment in ejectment in Missouri, where actions of that kind stand, with respect to the operation of a recovery therein as a bar or estoppel, in the same position as other actions, was held by this court conclusive, in a subsequent suit in equity between the parties respecting the title, upon the question of the satisfaction of the mortgage under which the plaintiff claimed title to the premises in the ejectment, and the question as to the fraudulent character of the mortgage under which the defendant claimed, because these questions had been submitted to the jury in that action, and

had been passed upon by them. The Court held, after full consideration, that in cases of tort, equally as in those arising upon contract, where the form of the issue was so vague as not to show the questions of fact submitted to the jury, it was competent to prove by parol testimony what question or questions of fact were thus submitted and necessarily passed upon by them; and by inevitable implication also held that, in the absence of proof in such cases, the verdict and judgment were inconclusive, except as to the particular trespass alleged, whatever possible questions might have been raised and determined. * * *

"It is not believed that there are any cases going to the extent that because in the prior action a different question from that actually determined might have arisen and been litigated, therefore such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action."

The rule is settled with the same firmness in New Jersey, *City of Paterson v. Baker,* 51 N. J. Eq. 49, where it is held:

"There is a difference between the effect of a judgment when it is set up in a second action founded on the same claim or demand on which the first action was founded, and when it is set up in a second action founded on a different

claim or demand from that on which the first action was founded. When the second action is founded on the same claim or demand the judgment is conclusive not only as to all matters which were actually litigated and decided, but as to all which might have been; but when the second action is founded on a different claim or demand the judgment is conclusive only as to such matters as were actually litigated and determined."

In *Clark Thread Co. v. William Clark Co.*, 55 N. J. Eq., 658-662, Vice-Chancellor Reed says:

"In respect to the first phase in which the question of estoppel presents itself, it is entirely settled that after one judicial determination by a court of competent jurisdiction, a second suit for the same matter, between the same parties or their privies, cannot be litigated in the same or any other court. Nor does it matter that, in the first suit, evidence existed which was withheld or undiscovered, or that the law was misconceived by the Court, or left uncited by counsel, or that no defense was made and judgment went by default, or that only one of several defences was interposed by the defendant; in spite of any of these defects in the prosecution or defence of the action, the judgment stands as an absolute bar against a second litigation of the same cause of action.

"When, however, a second suit is brought not for the same demand, but for a cause which was a part of the same matter, but was not included in the first action, the estoppel is not so sweeping. In such instances only those issues which are common to both suits, and which had to be or were actually decided in the first suit, are

regarded as *res adjudicata* in the second. This distinction between the two kinds of estoppel is lucidly stated by Mr. Justice Field in Cromwell v. Sac County, 94 U. S. 351. In that case there has been an action upon certain county bonds, in which action the county succeeded. In a subsequent action by substantially the same parties, upon other coupons on the same bonds, the previous judgment was set up as an estoppel. Mr. Justice Field, after speaking of the absolute estoppel as to every ground which might have been presented in the proceeding case, when a second action is brought for the same cause, goes on to say: 'When a second action is upon a different claim, the judgment in the prior action operates as an estoppel only as to those matter in issue or points controverted upon the determination of which, the finding of the verdict was rendered. In all cases, therefore, when it is sought to apply the estoppel of a judgment in one case to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been litigated or determined.' ''

In *Mercer County Traction Co. v. The United New Jersey Railroad and Canal Company*, 64 N. J. Eq. 588, a petition was filed by the traction company, to secure from the Court a method of crossing the railroad tracks of the Pennsylvania Railroad Company, and in opposition the want of the necessary consents to enable the trolley company to be properly constructed was raised. To meet this the petitioner offered the record of a certiorari proceeding by the railroad company against the petitioner,

brought to review the ordinance passed by the Township of Hamilton giving the petitioner permission to lay its road upon the highway. The certiorari had been dismissed, and hence it was urged that inasmuch as the want of consents could have been alleged therein the judgment on the certiorari was an estoppel in this proceedings. It was, however, held:

> "This judgment would conclude the two parties mentioned in any proceeding brought directly to test the validity of that ordinance. The doctrine of *res judicata,* however, differs when applied to a new proceeding for the same, or part of the same, cause of action, and when applied to a different cause of action. In the former instance, everything that could have made for the plaintiff or for the defendant is settled by the first judgment. In the latter instance, only those issues actually presented and decided are concluded. City of Paterson v. Baker, 6 Dick. Ch. Rep. 50; Clark Thread Co. v. William Clark Co., 10 Dick. Ch. Rep. 658, 662. The present proceeding must be regarded, not as a direct attempt to litigate the validity of the ordinance, but as a new proceeding in which the validity of the ordinance and the existence of certain conditions essential to the validity of the ordinance comes into question. Therefore the only point upon which the Pennsylvania Railroad Company is estopped are those actually litigated in the certiorari proceedings. The issue actually tried in that proceeding was whether the ordinance was good as against the reasons filed for its vacation.
>
> "In North River Meadow Co. v. Shrewsbury Church, 2 Zab. 424, an action of debt was brought to collect an assessment imposed upon lands belonging to the church. The meadow

company, in support of the assessment, put in evidence the record of a proceeding in certiorari, prosecuted by the church, to test the legality of the assessment. In this proceeding the assessment had been held to be legal. The Supreme Court held that, in the subsequent action to collect the assessment, the church was estopped from asserting that the assessment was invalid. It was so held upon the ground that the reasons assigned by the church for vacating the assessment in the certiorari proceeding embraced all the points suggested on the trial of the later action. It is true that, in the certiorari proceedings brought to test the ordinance in this case, general, as well as special, reasons were assigned for its vacation; but the Court was not obliged and, under its practice, would not notice the former, and, in fact, did not do so.

"Inasmuch as the want of filed consents by the abutting owners was not assigned as grounds of objection to the ordinance, the Pennsylvania Railroad Company is not estopped from now setting up this objection."

The effect of these decisions is this: Assuming that the New Jersey case is *res judicata* of anything all that it does determine is that the title of the complainants' predecessor to the *locus in quo*, arising by virtue of the Leeds' and McClees' deeds, is invalid. The effect of that adjudication is (if it amounts to anything) to estop the complainant from hereafter asserting in any proceeding any right by virtue of those deeds. He cannot in any proceeding claim that there was something in connection with the deeds which was overlooked and not brought to the Court's attention, and that there-

fore he is entitled to again litigate their effectiveness. In a word, the complainant's mouth is forever closed from making any claim to the *locus in quo* by virtue of those deeds, whether the particular point with reference to the deeds was or was not considered in the New Jersey case, but no estoppel exists with reference to the entirely distinct and new claim not litigated in the New Jersey suit, arising from the accretion. Here is a distinct muniment of title; just as distinct as if the complainant was relying upon other deeds, and the plea or claim of *res adjudicata* is, therefore, ineffectual. It is for this reason that Judge White, in his opinion, reported in 83 N. J. Eq. at p. 664, says:

> "Whether, under this view, the state's grant to Bartlett is valid, in so far as it includes land on the opposite side of New Hampshire Avenue from the location of the grantee's high land at the time the grant was made, is not before the court, because complainant sets up no title thereto except the recent McClees' and Leeds' heirs deeds, and these, obviously, conveyed nothing. If complainants have any title to the *locus in quo*, it must be by virtue of its being an accretion to their high land on the east side of New Hampshire Avenue. * * *"

It must be remembered that the statute—and this is wholly a statutory proceeding—makes no provision for a reply or counter-plea by the complainant to the claim which the defendant in his answer sets up. If the complainant can successfully bridge over the preliminary jurisdictional questions then the defendant occupies the position of *actor* or plaintiff and must establish the validity of the claim he has in his answer specified. The only purpose served by the complainant's allegation of the ground of his

claim of title, is to satisfy the Court that such claim is not merely frivolous. The Court of Errors in the New Jersey case concluded, inasmuch as the two quit-claim deeds of Leeds and McClees conveyed no title whatever that the claim was frivolous, and hence found that the plaintiff in that action was in no position to call upon the defendant to assert and prove his claim. There is nothing that required complainant in that action to manifest every claim that he had or might possess with reference to the land as a foundation upon which to fasten upon the defendant the duty of asserting his claim thereto. If the bridge had been crossed, then it would have been the duty of the Court to have settled the respective rights of the parties to the *locus* with reference to the claim thereto asserted by the defendant.

If defendant's theory is correct that the suit of *Dewey Land Company v. Stevens* is *res adjudicata,* then we have this anomaly: Of course, if it is *res adjudicata* against us, it would be in a suit instituted by defendant *res adjudicata* against the defendant, as that principle of law is mutual. Therefore, if his contention be true and we cannot maintain this suit because of the previous decision, and realizing that it is true that in the previous case the Court did not determine the rights of the parties, the situation is as follows: We are in peaceable possession of the land.

Defendants have a cloud upon that title which we desire to have quieted. We cannot have the title quieted because the previous suit is *res adjudicata.* Defendant cannot eject us because the suit of *Dewey Land Company v. Stevens* is *res adjudicata,* therefore defendant can never secure possession of the land and we can never remove his claim. The title must forever remain imperfect and with that imperfect title his possession is forever secure.

The other aspect of the bill, presented by virtue of the new equity rules, is asserted in the sixth and seventh paragraphs of the bill, and is entirely independent of the New Jersey statute referred to, and is an appeal to the original equitable jurisdiction of the Court *quia timet* seeking to remove from the title of the complainants to the *locus in quo*, the cloud thereon arising by virtue of the riparian grant, which is alleged to be void and of no avail against the complainants. There is no pretense that this issue was raised in the New Jersey case.

The distinction between these two causes of action is noted in *Nixon v. Walter*, 41 Eq. 103, wherein a tract of land bounding on the high-water mark of Delaware Bay and Morris River Cove, having a width of six rods, was conveyed to one person and the land more remote from the bay was conveyed to another person, having for one of its boundaries the inward line of the six rod strip previously conveyed. The waters of the bay and cove gradually submerged the six acre tract, which at the time of the conveyance was high land, whereupon the owner of that tract made claim that he was entitled to a moveable freehold, citing the case of *Scratton v. Brown*, and the owner of the more inland tract filed a bill to quiet title under the statute, but failed to maintain it as such bill because he was unable to prove peaceable possession, which had been denied by the defendant. He was permitted to maintain the bill as a bill *quia timet*, and obtained a decree in his favor, the Court holding that the six rod strip of upland was a fixed freehold, and as that strip was eaten away by erosion, the owner thereof lost just as in the event of accretions he would have gained by the action of the waters. The right to maintain a bill *quia timet* is further shown by the following cases: *Sheppard v. Nixon*, 43 Id. 627;

American Dock & Improvement Co. v. Trustees for the Support of Public Schools, 39 N. J. Eq. 409.

There are, therefore, two distinctions between the suit at bar and the New Jersey case, the decree in which is claimed to be *res adjudicata* of this issue.

First: Assuming, which we deny, that the New Jersey case decided anything and is *res adjudicata* of any thing, it simply held that we have no title by virtue of the Leeds' and McClees' deeds. Here we are claiming both possession and title by virtue of accretion, an entirely distinct thing as appears from the opinion of Mr. Justice Swayze.

Second: We assert an independent claim under the general equitable jurisdiction of the Court, to have the cloud arising from the riparian grant removed, and our right to this relief is based not upon the statute, but upon equitable principles *quia timet*. It is, therefore, obvious that, attributing to the New Jersey case the dignity of an adjudication (which it does not deserve), neither one of the issues here raised was raised there.

Indeed it is believed that the argument in the opinion of Judge Haight upon this subject is unanswerable and leaves little to be added.

The distinction between the statutory action *quia timet* and the general jurisdiction of a Court of Equity *quia timet* is obvious, and plainly appears in the article entitled "Quieting Title" in 32 *Cyc.* p. 1305 and 1387 in which the effect of a decree in the one case is shown to be very different from that in the other.

Appellant's brief (p. 19) would indicate that the prayers of the two bills are the only distinguishing marks between them, ignoring the additional averment (p. 7, §6 and p. 33, §7), in the stating part

of the bill in the new suit setting up this new feature as a further and distinct cause of action.

It is therefore plain that the complainant under this second ground of jurisdiction has the right to have the Court adjudge that the cloud which the riparian grant of the defendant creates upon the *locus*, as well, since the amendment to his answer, as that created by his claim for accretions, should be adjudged of no avail. We have already indicated the consequences of leaving the matter as the defendant would have it. Our possession could not be disturbed; and, on the other hand, we could in no way have the Court pass upon the validity of these two claims upon the *locus* that the defendant persists in asserting.

Under the New Jersey Statute, in a proper case, the Court of Chancery is required to fix and determine the title of the parties. In the case at hand, if this suit is *res adjudicata* as to one of the parties, it is *res adjudicata* as to the other, and if *res adjudicata* as to the plaintiff, there is a cloud upon the title of plaintiff which he cannot have removed, because the Court failed to fix the title in plaintiff, and the defendant can never question plaintiff's possession or title in another suit, because title to land being in question and the previous suit being *res adjudicata* touching title, the Court not finding title in the defendant, is forever estopped from asserting title or possession against plaintiff. The result would be that the title of plaintiff must, therefore, forever remain under a cloud, but with that clouded title, his possession is forever secure.

The property is excessively valuable and to permit the complainant to be placed in this anomalous situation by a mere surmise as to what was intended in the other suit would be, as Judge Haight in his opinion suggests, the height of folly and injustice.

ACCRETIONS.

In the trial of this cause, defendant specifically stated to the Court that he was making no claim to accretions, but claiming under his riparian grant (see discussion, pages 84, 85 and 86), and the following conclusion:

> "The Court: Well, I don't understand that that was his point, I take it—I may be entirely wrong, what his point is that at the time of the grant by the riparian commissioners the high-water line was at a point about where the ground begins to go eastward or towards the ocean and that therefore that was all land under water that was covered by the grant, and therefore that he had a right to it, isn't that your point?"
>
> Mr. Carr. Yes. That's my theory.

Atlantic City was incorporated as a city in 1854, but two years previous thereto a survey was made of the high-water line by Mr. Rowland, which water line thus surveyed was utilized by the owners of the soil in making the dedication map of Atlantic City, which is offered in evidence in this case and is marked Exhibit C9. Streets were laid out, those running in the same direction as the general contour of the ocean being named after the oceans, to wit, Pacific Avenue, Atlantic Avenue and Arctic Avenue, and those running at right angles to the ocean being named after the states, beginning at the Inlet or east end of the island with Maine Avenue, then New Hampshire, Vermont, Rhode Island, Massachusetts, Connecticut, and so on toward the west. At the time of the plotting of the map of 1852, New Hampshire Avenue was mapped and laid out from the bay to the ocean. The distance from Pacific Avenue

along New Hampshire Avenue to the ocean as scheduled on the map was 1450 feet.

The land involved in this suit formed part of a much larger tract which was owned by the Leeds' heirs, and finally vested in Robert B. Leeds, who in July of 1856 conveyed it to John McClees (Exhibit P8).

John McClees, in March of 1858, conveyed a small portion of said lands to Jonah Wootton, described as follows:

> BEGINNING in the Westerly side of New Hampshire Avenue 150 feet South from the South line of Pacific Avenue; thence (1) West, parallel with Pacific Avenue, 160 feet; (2) South, parallel with New Hampshire Avenue, 100 feet; (3) East, parallel with Pacific Avenue, 160 feet to the West line of New Hampshire Avenue; (4) North, in and along the West line of New Hampshire Avenue, 100 feet to the beginning. (Exhibit P9.)

McClees' original line began at a point in Pacific Avenue easterly of Vermont Avenue and ran to the ocean, not parallel with Vermont Avenue but deflecting towards the north.

The land lying westerly of McClees' land was owned by Jacob R. Eby, and in January of 1860 McClees and Eby exchanged quit-claim deeds, McClees quit-claiming to Eby a triangular tract beginning in the southerly side of Pacific Avenue and extending from McClees' beginning corner to a point 175 feet distant easterly from Vermont Avenue, which was the middle of the block, said blocks being 350 feet between streets; thence southerly, parallel with New Hampshire Avenue to a point in the line between McClees' and Eby's property. Eby conveyed to McClees a triangular strip beginning in said divi-

sion line of their properties 175 feet easterly of Vermont Avenue, and extending thence parallel with Vermont Avenue to the ocean; thence along the ocean line to McClees' westerly line; thence to the place of beginning.

The effect of these two quit-claim deeds was to vest title in McClees to the land beginning 150 feet easterly of Vermont Avenue and running southerly, parallel with Vermont and New Hampshire Avenues to the ocean, and vesting a like strip of land in Eby. The object, of course, was to square their properties so that their division line thereafter should run parallel to the street system (Exhibit P10).

Exhibits P13 and 14 were for the same lands as mentioned in Exhibit 10.

Between the date of the Eby deed and 1876, the ocean during a succession of storms, washed away the point of the beach and up along the Inlet until the high-water line threatened the United States Government Lighthouse erected on the southerly half of the block bounded by Vermont Avenue on the east, Rhode Island Avenue on the west, and Pacific Avenue on the south. The water encroaching upon that lot at the corner of the east side of Vermont Avenue with the north side of Pacific Avenue. Maine Avenue was entirely submerged. There was no Pacific Avenue easterly of Vermont Avenue, and no lands lying southerly of Pacific Avenue and easterly of Vermont Avenue, and only a small portion of the land lying southerly of Pacific Avenue eastwardly of Maryland Avenue. In fact, the ocean washed all this land away, leaving the contour a circle with a very great radius.

The manner in which the lands were swallowed up was as follows: The northeast storms would carry the surface waters of the ocean high up on the beach,

the tendency of the wind being to hold it there. The waters thus driven up by reason of the strong wind on the surface, would return at the bottom and thus carry the sand into the ocean with them. This undercurrent which cuts away the beach is called the undertow. This process would wash away the lands until it would reach the sand hills, when it would undermine them and the top part would fall into the ocean and it with the rest would be carried away. Each of these storms would wash away 75 to 100, and at times more than 100 feet, of the land, pp. 184-136. After the wind had changed to the west or northwest, the converse became true. The wind would blow the waters away from the beach, which would return at the bottom, and these waters would carry sand with them, which would be deposited on the beach, and gradually make it up. The storms, however, up to 1875 or 1880 were so severe that all the point of the beach was carried away. After 1880 the storms seemed to become less severe, and the beach was made up and has continued to make up until now it is practically where it was in 1852.

After this beach land made up, in March of 1897 McClees conveyed to the Atlantic City Beach Front Improvement Company all his remaining lands by the following description:

> BEGINNING in the South side of Pacific Avenue 175 feet East of Vermont Avenue, thence extending (1) East 746 feet more or less to line of Camden and Atlantic Land Company; (2) South, 44½ degrees East by said line 336 feet to Absecon Inlet; (3) South by the high water mark 1024 feet to a point 175 feet East of Vermont Avenue measured at right angles thereto; (4) North, parallel with Vermont Avenue, 650 feet to the beginning.

Excepting the following:

> BEGINNING in the West side of New Hampshire Avenue 150 feet South of the South line of Pacific Avenue: (1) West, parallel with Pacific Avenue, 160 feet; (2) South, parallel with New Hampshire Avenue, 100 feet; (3) East, parallel with Pacific Avenue, 160 feet to the West line of New Hampshire Avenue; (4) North, in and along said West line of New Hampshire Avenue, 100 feet to beginning,

which land had been previously conveyed to Wootton (Exhibit P15).

In November of 1889, Atlantic City Beach Front Improvement Company conveyed to Henderson, Moss and Hancock a portion of the above-described land, described as follows:

> BEGINNING in the South line of Pacific Avenue, 280 feet East of New Hampshire Avenue: (1) East along the South line of Pacific Avenue to the line of lands of the Camden and Atlantic Land Company; (2) South, 44½ degrees East by said line 336 feet to the edge of the Absecon Inlet or Atlantic Ocean; (3) South by the high-water mark to a point 90 feet East of the East line of New Hampshire Avenue if the same were extended; (4) North, parallel with New Hampshire Avenue, crossing Oriental Avenue and Dewey Place to a point 100 feet South of the South line of Pacific Avenue; (5) East, parallel with Pacific Avenue, 190 feet; (6) North, parallel with New Hampshire Avenue, 100 feet to the place of beginning (Exhibit P16).

Henderson, Moss and Hancock, in April of 1903, conveyed a portion of said lands to Roland Conrow by the following description:

BEGINNING in the South line of Pacific Avenue 280 feet East of New Hampshire Avenue: (1) East, along the South line of Pacific Avenue, 120 feet to the West line of Maine Avenue; (2) South, along the West line of Maine Avenue, 460 feet to high-water mark; (3) Extending in line of Maine Avenue extended to a point in the line of high-water mark as it existed in 1856; (4) South, along said line of high-water mark as it existed in 1856 to a point 90 feet East of the East line of New Hampshire Avenue; (5) North, parallel with New Hampshire Avenue, and 90 feet therefrom, to the South line of Dewey Place; (6) East, along the South line of Dewey Place 190 feet. (7) North, parallel with Maine Avenue, crossing Dewey Place, 240 feet to beginning (Exhibit P18).

Roland Conrow in April of 1903 conveyed to the States Avenue Land Company the following tract of land:

BEGINNING in the South line of Dewey Place 90 feet East of New Hampshire Avenue: (1) East, in front or width along Dewey Place, 100 feet; (2) by a length South between parallel lines parallel with New Hampshire Avenue at right angles to Dewey Place 350 feet more or less to high-water mark; (3) still extending oceanward between parallel lines to the high-water mark as the same existed in 1856 (Exhibit P19).

Atlantic City Beach Front Improvement Company, in May of 1900, conveyed to States Avenue Land Company the following:

BEGINNING in the East line of New Hampshire Avenue 240 feet South of Pacific Avenue, being the Southeast corner of a 50 foot street known as Dewey Place: (1) South, along the East line of New Hampshire Avenue, 160 feet to high-water mark; (2) East, by the same to a point 90 feet East of the East line of New Hampshire Avenue; (3) North, parallel with New Hampshire Avenue, 160 feet more or less to Dewey Place; (4) along the South line of Dewey Place 90 feet to the East line of New Hampshire Avenue (Exhibit P17).

These two conveyances vested in the States Avenue Land Company a tract of land beginning in the east line of New Hampshire Avenue and extending easterly at right angles thereto 190 feet, and of that width throughout southerly, parallel with New Hampshire Avenue and in and along the east line thereof to the ocean.

The States Avenue Land Company in December of 1904 conveyed to the Dewey Land Company said tract of land by the following description:

BEGINNING in the East line of New Hampshire Avenue 240 feet South of Pacific Avenue: (1) East, parallel with Pacific Avenue, along the South line of Dewey Place 190 feet; (2) South, parallel with New Hampshire Avenue, 294 feet more or less to the high-water mark of the Atlantic Ocean; (3) Southwest along the high-water line to the East line of New Hampshire Avenue; (4) North, along said line of New Hampshire Avenue 438 feet to the beginning (Exhibit P20).

Dewey Land Company in December of 1907 conveyed to Samuel F. Nirdlinger an undivided one-fourth part as follows:

BEGINNING at a point in the East line of New Hampshire Avenue 240 feet South of Pacific Avenue: (1) East, parallel with Pacific Avenue, 190 feet; (2) South, parallel with New Hampshire Avenue, 294 feet to high-water line; (3) Southwest, along the high-water line to the East line of New Hampshire Avenue; (4) North, along said line of New Hampshire Avenue 438 feet more or less to beginning (Exhibit P21).

Dewey Land Company, in January of 1909, conveyed an undivided one-half interest to Samuel F. Nirdlinger as follows:

BEGINNING in the East line of New Hampshire Avenue 240 feet South of Pacific Avenue: (1) East, parallel with Pacific Avenue, 190 feet; (2) South, parallel with New Hampshire Avenue, 294 feet to the high-water line; (3) Southwest, along the high-water line to the East line of New Hampshire Avenue; (4) North, along the East line of New Hampshire Avenue, 438 feet more or less to the beginning (Exhibit P22).

Dewey Land Company, in February of 1909, conveyed to Nirdlinger an equal undivided one-sixth part as follows:

BEGINNING at a point in the East line of New Hampshire Avenue 240 feet South of Pacific Avenue: (1) East, parallel with Pacific Avenue, along Dewey Place, 190 feet; (2) South, parallel with New Hampshire Avenue 294 feet to the high-water line; (3) Southwest, along the high-water line to the East line of New Hampshire Avenue; (4) North, along the East line of New Hampshire Avenue 438 feet to the beginning (Exhibit P23).

Dewey Land Company, in July of 1912, conveyed its remaining lands to Louis E. Stern by the same description (Exhibit P24).

Samuel F. Nirdlinger, in July of 1912, likewise conveyed to Louis E. Stern all his interest in said lands by the same description (Exhibit P25).

Louis E. Stern, in July of 1912, conveyed to Samuel F. Nirdlinger an undivided one-half interest in said lands by the same description (Exhibit P26).

Louis E. Stern, in July of 1912, conveyed to Dewey Land Company an undivided one-half interest in said lands by the same description (Exhibit P27).

Dewey Land Company, in February of 1914, conveyed to Samuel F. Nirdlinger its one-half interest in said lands by the same description (Exhibit P28).

Defendant's title is founded upon two conveyances from Atlantic City Beach Front Improvement Company to William H. Burkhard, dated November, 1898, and the land is described as follows:

> BEGINNING at the Northwest corner of New Hampshire and Oriental Avenues, said point being 400 feet South from the Southwest corner of New Hampshire and Pacific Avenues: (1) West, in the North line of Oriental Avenue, 175 feet; (2) North, parallel with New Hampshire Avenue, 150 feet; (3) East, parallel with Oriental Avenue, 175 feet to the West line of New Hampshire Avenue; (4) South, along the West line of New Hampshire Avenue, 150 feet to the beginning.
>
> BEGINNING at the Southwest corner of New Hampshire and Oriental Avenues; thence (1) West, by Oriental Avenue, 175 feet; (2) South, at right angles to Oriental Avenue, 50 feet more or less to the high-water mark of the Atlantic Ocean; (3) East, by the same, 188 feet to the

West line of New Hampshire Avenue; (4) North by the same 24 feet more or less to the beginning (Exhibits D4, also D1, pages 91 and 92).

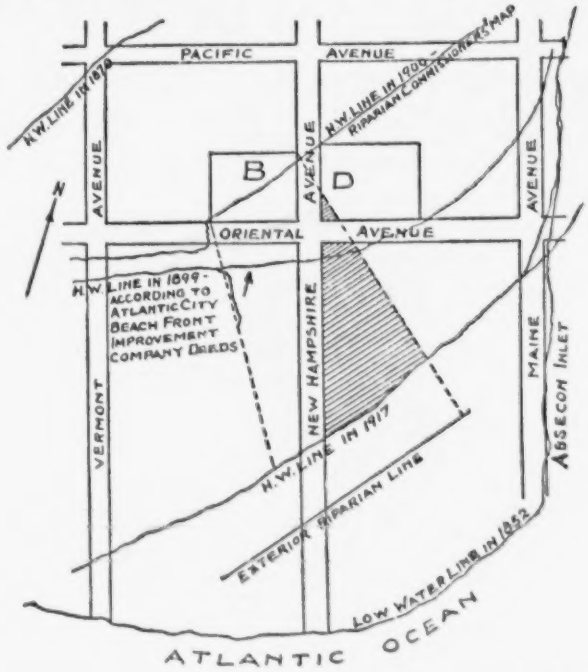
William H. Burkhard conveyed the lands to William H. Bartlett and Elwood S. Bartlett in November, 1899, by the same description, calling for New Hampshire Avenue as a boundary.

Bartlett conveyed to Stevens in April of 1905 by the following description:

BEGINNING in the West line of New Hampshire Avenue 250 feet South of Pacific Avenue; (1) parallel with Pacific Avenue, 160 feet; (2) north, parallel with New Hampshire Avenue, 100 feet; (3) West, parallel with Pacific Avenue, 15 feet; (4) South, parallel with New Hampshire Avenue and Vermont Avenue, 250 feet to the North line of Oriental Avenue; (5) parallel with New Hampshire Avenue and Vermont Avenue, crossing Oriental Avenue and the high-water line to the exterior line of commissioners; (6) then following the riparian grant to the place of beginning (Exhibit D6).

The *locus in quo* consists of a triangular tract of land lying on the easterly side of New Hampshire Avenue, in front of the fast land of plaintiff, lying on the said ~~westerly~~ side of New Hampshire Avenue. It is claimed by the defendant as accretions to his land, whose fast land lies upon the Westerly side of the same avenue. The hatched portion of the following map, copied from the opinion of Judge

Haight in the United States District Court (262 Fed. page 595) shows the land in dispute.



All the regained land, including the lands hereinabove described were sold by McClees and by the purchasers, has been divided into lots with the lines running parallel to the streets, and sold to numerous persons, a large part of which land has been mortgaged by similar descriptions, there being on record for the lands lying southerly of Pacific Avenue and easterly of New Hampshire Avenue 106 conveyances. There are of record for the lands lying southerly of Pacific Avenue and between New Hampshire Ave-

nue and Vermont Avenue at least 200 conveyances, all of which conveyances excepting three or four are described as running parallel to the street system. Of these three or four, two are accounted for by the quit-claim deeds between McClees and Eby, and one by the riparian grant to Stevens.

On the portion of land lying southerly of Pacific Avenue and easterly of New Hampshire Avenue, touching which there are 106 conveyances of record, there are 70 mortgages; and on the tract of land between Vermont and New Hampshire Avenues lying southerly of Oriental Avenue there are 85 mortgages. The aggregate amount of the 70 mortgages covering the land south of Pacific Avenue and east of New Hampshire Avenue is $573,957.00. On the block of land lying easterly of New Hampshire Avenue and northerly of Pacific Avenue there are 102 conveyances of record, and since 1900, mortgages have been placed on that land aggregating $1,430,000.00, and the value of the real estate covered by the mortgages is much greater.

From the Inlet to Albany Avenue southerly of Pacific Avenue, the boundary lines of practically all of the conveyances run at right angles to the street system. All of the large beach front hotels and hundreds of cottages and stores lying easterly of South Carolina Avenue are built upon lands that have been made by accretion. These hotels include the Chalfonte and Haddon Hall at the ocean end of North Carolina Avenue, the Strand and Seaside at the ocean end of Pennsylvania Avenue, the St. Charles at the ocean end of St. Charles Place, the Breakers at the ocean end of New Jersey Avenue, and the Royal Palace at the ocean or inlet end of Pacific Avenue. p. 166.

The high-water line of the Atlantic Ocean did not

run parallel with Pacific Avenue, and the property lines if extended at right angles to the high-water line would all deflect from the course of the streets running to the ocean.

Defendant claims that the *locus in quo* is accretion to defendant's lands, and that the easterly boundary line thereof should run obliquely to and across New Hampshire Avenue and across the lands on the easterly side thereof, basing his argument either upon the dictum of Judge White in the Dewey Land Company case, or else upon the common law theory that accretions should be apportioned by drawing a line at right angles from the thread of the stream to the side boundary lines of the owner's fast land.

As to the first contention, it is sufficient to say that the Riparian Commissioners of the State of New Jersey have no authority over lands, or to fix the boundary lines of lands, above the high water mark. They have an absolute authority to fix the lines of lands granted or leased by them under water, but their authority terminates with the high water mark. *New Jersey Statute* and *Polhemus v. Bateman* (60 L. 163).

The second contention is said to be based upon equity, to wit, that the man owning lands bounded by navigable waters, being always in danger of losing them by the action of the waters, shall, as compensation, have the lands gained by accretion.

The inequity of the present case is found in two facts—first, the defendant claims not his land that was lost by erosion or avulsion, but the land of his neighbor. His fast land lies upon the westerly side of New Hampshire Avenue, and because the high water line at that point happens to curve to the left or north, he claims that he is entitled to extend his lines across New Hampshire Avenue to the easterly

side thereof, and take as his accretions, land lying in front of plaintiff's land lying on the easterly side of that avenue.

The second erroneous contention is admitting the common law rule applied in some of the cases, that the accretions should be apportioned by drawing a line at right angles from the thread of the stream to the side line of the owner's fast land. Nobody in this case has determined the course of the thread of the stream. The thread of the stream means the channel. This land lies along the Atlantic Ocean. Which one of the hundreds of channels or currents in the ocean does defendant adopt? The trial Court found none, and it is respectfully submitted that no Court will determine which of the hundreds of currents constitutes *the* current or the channel, without evidence touching the matter.

Plaintiff contends that the accretions are the lands made up by the action of the ocean within the side lines of the respective properties, and that the accretions of plaintiff in the case at hand are those lands that have been added by the imperceptible deposit of the ocean between the extended side lines of plaintiff's property, to wit, the easterly line of New Hampshire Avenue, on the one side, and a line parallel thereto and 190 feet easterly therefrom, on the other.

Plaintiff claims the *locus in quo* is accretion to its lands upon the theory that accretions are divided on an equitable basis, and nothing can indicate more clearly how inequitable it would be to divide them upon the basis of defendant's claim, than is shown by the map of the *locus in quo*.

A reference to the map will show that by reason of the ownership of a triangular strip of land, having its apex in the westerly line of New Hampshire

Avenue, a width parallel with Pacific Avenue of 175 feet and a depth parallel with New Hampshire Avenue on one side of 50 feet, defendant contends he is entitled to the accretions of practically the whole of the land lying within the lines of his original grant extended parallel with the westerly side of New Hampshire Avenue to the ocean, and in addition thereto to practically one-half of the lands of Nirdlinger, being 190 feet on Dewey Place and of that width extending to the ocean, and in addition thereto to a portion of the lands lying easterly of the Nirdlinger lands.

If the Court should hold that the line of accretions should take this oblique course, then neither complainant nor defendant have title to the fast lands on which they base their right to accretions. The undisputed testimony shows that about 1875 the Atlantic Ocean had washed in and over all of the lands now in question and up to the intersection of Vermont and Pacific Avenues. All the lands of McClees at that time were submerged lands, and if the title to the new lands formed by accretion is to be run obliquely, then there is no evidence of title in McClees nor in either complainant or defendant.

The testimony of Walter Somers, page 75, is as follows:

> "Q. Mr. Somers, these northeast storms, these are what do damage to the beach?
>
> A. Yes, sir.
>
> Q. They cut it in how much sometimes at a time?
>
> A. Well, late years it don't wear away very much because they have these jetties all along there.
>
> Q. I don't mean that, I mean in former years when it was way up there so far, it was cut in

how much, 100 feet, 200 feet at a time, wouldn't it?

A. I couldn't tell exactly but I know some mornings we would get up and the beach all washed away in one night."

At page 101 Joab Higbee testified:

"Q. And heavy storms make great inroads in them, don't they?

A. Yes, sir.

Q. Sometimes cut away 100 or 200 feet in one storm?

A. I have saw it cut away 50 or 75 feet in a storm. Sat there and looked at it and see the easterly tide, when a swell come in there, cut the sand, roll down there—it would roll down in twenty-five carloads to one sea (wave).

Q. And the next swell came in, just took that out to sea and that's the last you ever saw it?

A. Washed it right down this way, to the southwards all the time."

At page 112, James Mills testified:

"Q. Captain, the timber that grew on Absecon Beach was red cedar, wasn't it?

A. Yes, sir, red cedars, hollies, briars and everything.

Q. And it was the common thing to set houses on red cedar piling, wasn't it?

A. They did.

Q. And red cedar was a good deal easier to get down there than brick?

A. Well, there wasn't so many of them till you got down to the beach.

Q. There were plenty on Absecon Beach?

A. Down towards Longport, yes.

Q. Well, there were some, weren't there, up at Vermont Avenue?

A. Well, I will tell you how many cedars at Vermont Avenue, tell you where they started from.

Q. How many were there?

A. Well, I tell you, there was two hills, you understand. One ran from Vermont and Railroad Avenue and the other ran from Vermont and Atlantic down what they call Sharp's —Mr.—was talking about the hills washing away and the cedar trees falling. I stood there a day and seen them falling myself.

Q. That was during severe storms you would see them fall down?

A. Why, yes, sir, a northeast storm would cut them down, yes, sir.

Q. And, of course, would cut the other part of the beach as well, didn't just stop right there?

A. Washed it away, yes, sir.

Q. I think that's all, Captain."

At pages 98 and 99, Alfred Smith testified:

"Q. How much have you known these storms to cut in the beach either on Absecon Beach or on Brigantine Beach, a single storm there, how many feet have you known to be washed away?

A. That would depend on places; where high hills were up I have known it to cut in there quite a distance, probably ten or twenty feet, undermine the hill, then it would drop down.

Q. And you could see that when it was cut—you could see the hills fall in and see it wash out?

A. Yes, sir.

Q. Now, have you ever seen the storms undermine the trees on Absecon Beach?

A. I never did see it, I know it has been done."

At pages 93 and 94 Thomas Horner testified:

"Q. Do you remember when what is now the point of the beach, the land below Pacific Avenue and easterly of New Hampshire Avenue, was wood?

A. There used to be high cedar trees there, a big bluff.

Q. Now, were you ever there when there was a storm and saw those trees fall in?

A. I have seen them after they have fell in.

Q. After they have fallen in?

A. Yes.

Q. Have you ever been there when there was a storm and seen the sand hills fall in?

A. Oh, yes, lots of times.

Q. Captain, would that be occasioned by the water cutting in under them?

A. That come in under the beach, undermined the trees and they would fall over into the surf.

Q. But you couldn't see the cutting process?

A. No, you couldn't see that.

Q. That's all."

Whether the Court will find that this land was lost by avulsion or whether it finds it was lost by erosion, in our opinion leads to the same ultimate result, only upon different theories. If it was lost by avulsion, then plaintiff's predecessor in title never entirely lost his interest in the land, even though it was for a time covered by the Atlantic Ocean. It

is admitted and stipulated that it was regained by accretion. If it were lost by erosion, then all title to plaintiff's predecessor in title to the land under water vested in the state. If it was lost by avulsion, plaintiff's predecessor in title did not lose his entire interest in the land, but when it reappeared by accretion, it became his land, according to the original boundaries. In re: *City of Buffalo* (206 N. Y. 319—99 N. E. 850); *Mulrey v. Norton* (100 N. Y. 424—20 Law Ed. 939); *Shriver v. Ocean City Assn.* (64 N. J. L. 550); *DeLancy v. Wellbrock* (113 Fed. Rep. 103-105); *Stockley v. Cissna* (119 Fed. 812).

If the land was lost by avulsion, plaintiff's predecessors in title not having lost his entire interest in the land under water, when he made a conveyance of the land above water, bounding it by the high water mark, conveyed all his interest under the high water mark within the side lines of such conveyance. *Banks v. Ogden* (2 Wall. 57—17 L. Ed. 818), wherein Chief Justice Chase said:

> "That a grant of land bordering on a road or river carries the title to the center of the river or road, unless the terms or circumstances of the grant indicate a limitation of its extent to the exterior line." *Salter v. Jones* (39 N. J. L. 469).

If the land was lost by erosion, and the title thereupon vested in the state, when the accretions appeared, if they are apportioned as hereinafter contended for by us, and as the District Court and Circuit Court of Appeals found, then plaintiff would be entitled to the accretions within his side lines, extended precisely as in the case if the lands were lost by avulsion.

In the case of *Jefferis v. East Omaha, &c.* (134 U. S. 178—33 L. Ed. 872), in which the United States Government made survey of land to a patentee lying on the southerly side of the Missouri River, and after the survey had been made, but before the patent was granted, considerable land was made by accretion, this Court held that the lands made by accretion would be included in the patent within the original side lines to the southerly line of the Missouri River. The Court in conclusion saying:

> "But we think that in all the deeds, the accretion passed by the description of the land as lot 4. In making every deed, the grantor described the land simply as lot 4, and did not, by his deed, nor does it appear that he has since or otherwise, set up any claim to any accretion. It must be held, therefore, that each grantor, by his deed, conveyed all claim not only to what was originally lot 4, but to all accretion thereto. When McCoid, in 1854, conveyed his interest in the premises by the description of lot 4, as he had taken a deed of the undivided half of the premises by the same description from Joseph I. Town, in September, 1857, and had title thereby up to the river, his north line was the river, which was gradually adding land to his land.
>
> "These views result in the conclusion that the side lines of lot 4 are to be extended to the river, not as the river ran at the time of the survey in 1851, but as it ran at the date of the patent in 1855, and that all the land which existed at the latter date, between the side lines so extended and between the line of the lot on the south and the river on the north, was conveyed by the patent."

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After the lands reappeared, McClees repossessed himself of them, and to this day no person has ever questioned his title thereof.

McClees conveyed his title to the Atlantic City Beach Front Improvement Company, with the exception of one tract previously conveyed to Wootton, and by successive conveyances his title to the fast lands has passed to complainant and defendant through respective deeds, both being bounded by New Hampshire Avenue.

New Hampshire Avenue was laid out on the map in 1852 or 1854, at which time the land now in question was high, fast land, and as early as 1858 a conveyance was made by McClees to Wootton of a tract of land bounded on the east by New Hampshire Avenue. All the conveyances by the respective owners of the lands on either side of that avenue have been conveyed with respect to that avenue as one of the boundaries, so that the avenue has been recognized as a division line between property for the past sixty-five years theoretically, and for the past fifty-nine years by actual conveyance (Plaintiff's Exhibits 9 to 28; Defendant's Exhibits 1, 4, 6).

If the *locus in quo* be considered as lands formerly above the high water lost by avulsion that were for a time submerged and have again reappeared, then the conveyance to the defendant having New Hampshire Avenue as its boundary, and the conveyance to the complainant having New Hampshire Avenue for one of its boundaries, New Hampshire Avenue will continue the dividing line between those properties.

If, on the other hand, the lands be considered as accretions, then there has been such a manifestation of intention by the owners to constitute New Hampshire Avenue a division line between them that it

would now be inequitable for the Court to fail to give it effect.

In this connection the following observations of Judge White in the Dewey Land case are important. He says:

> "If complainants have any title to the *locus in quo*, it must be by virtue of its being an accretion to their high land on the east side of New Hampshire Avenue, and the efficacy of such a claim of title would necessarily depend upon whether the owner of the former fast land, as it existed in 1853, in then dedicating and opening a public street, New Hampshire Avenue, across the same, to and at right angles to the ocean, had so divided his land into two parts, and fixed the natural side lines of accretion gains for those parts respectively as to have rendered it inequitable for the state to have disregarded the lines so fixed in making its subsequent survey and grant. Valentine v. Piper, 22 Pick. 95. But, as before stated, that question is not in my judgment involved in and is therefore not decided by this case."

This principle is brought out with great force in *Valentine v. Piper*, 22 Pick. 85, and is reaffirmed in *Piper v. Richardson*, 9 Metcalf, 155, and *Drake v. Curtis*, 9 Cush. 446, where the doctrine of the previous cases that the owner had previously laid out the property with reference to the lines of a street, was held to be sufficient reason for extending the lines of the lots on either side of the street parallel thereto. See also *Commonwealth v. City of Roxbury*, in the note to 9 Gray, 523, as well as *Gerish v. Gary*, 120 Mass. 132; *Adams v. Wharf Co.*, 76 Mass. 521, and *Attorney-General v. Boston Wharf Co.*, 78 Mass. 553.

The testimony shows all of the land in this vicinity to be of the same character as the *locus in quo,* and if it be considered as accretion, there have been more than three hundred conveyances all running parallel with or at right angles to the street system. In all these conveyances not a single owner has asserted claim to title except in front of his property, that is, within the limits of the side lines of his lot extended.

This accreted land, and the buildings erected thereon, from the evidence must be of the value of several millions of dollars.

In addition to the successive conveyances from grantor to grantee, of all of those lands during all the past forty or more years, there have been practically two hundred mortgage liens created on this same land. All of these liens have likewise been for tracts of land running parallel to or at right angles to the street system, and the present amount of these mortgages, according to the testimony, exceeds $2,000,000. So that in every conveyance by grantor to grantee, or from mortgagor to mortgagee, the parties have dealt with these accretions as though the accretions were formed in front of their lots within the side lines of their lots extended. Their successive conveyances and mortgages show conclusively their intention as to the manner in which these accretions should be divided.

In the case of *Dawes v. Prentice,* 33 Mass. 435, the intention was gathered from one of the courses in the deed, as was the case in *Smith v. Smith,* 100 Mass. 302, and *Stockham v. Browning,* 18 N. J. Eq. 390. In the present case such intention is to be drawn from the courses in the successive deeds of all the grantors for all the land in this vicinity, hence complainant contends that the Court will award

this accreted land in the same manner that all these owners have dealt with it. To make a different decree will mean to unsettle all the real estate and mortgage titles to all the land in this vicinity, and elsewhere along the Atlantic City ocean front, including the land on which is erected the Royal Palace Hotel, the Breakers, the St. Charles, the Seaside, the Strand, the Chalfonte and Haddon Hall (page 166).

To decree that these accretions are to be apportioned obliquely would mean to cast a cloud upon every title and upon every mortgage not only in the section of Atlantic City where the *locus in quo* is situate, but also upon all the ocean front properties in Atlantic City, as there is evidence to show that all the land along the ocean front is accretion (page 166), and that the high-water mark did not run parallel with Pacific Avenue or at right angles to the cross streets, and that all the conveyances and mortgages have been made either at right angles or parallel to the street system (page 261, line 10). Not only should the title be apportioned in conformity with the conveyances made by the owners of the property, but it is contended as a matter of law that accretions can never cross a street where there is a private owner on both sides of it.

In the opinion of Judge White it was suggested that a Court might follow the line of the riparian grant in apportioning accretions. The opinion was not necessary to the case, in fact it was not even a *dictum* because accretions were not involved in that case, and both opinions rendered in the case expressly exclude the accretions therefrom.

In answer to defendant's like contention, it will be recalled that the riparian commissioners have no authority except such as is conferred upon them by

the acts of the legislature concerning riparian grants. Their duties are confined to lands covered by water. They have no authority over lands above the high-water mark. In other words, the riparian commissioners have no jurisdiction over accretions, and by no possibility could their determination, if they attempted one, have any binding force upon a court.

An examination of the record in the case of *Dewey Land Company v. Stevens*, which is in evidence, will disclose the fact that there is nothing in it whatever to justify the statements in this part of Judge White's opinion, to the effect that the riparian commission have adopted any system, equitable or otherwise, in making their grants, or forming a basis for the conclusion he reaches that there should be equitably some similarity between the lines run by them in attempting to make their grants, and the lines to be established for accretion. In fact, the very grant made by the commissioners in this, as in all other cases, is expressly bottomed upon the assumed ownership of the upland in the applicant as contiguous to the granted territory in the direction indicated in the grant.

The right of accretion is not a mere illusory right, but a real one.

Under our Act of 1869 it is provided that a grant may be made to a person other than the owner, provided six months previous notice be given to the owner of the ripa. As a means of testing the statement of Judge White, suppose A, being the riparian owner, and under the Act of 1869, a riparian grant be made to B, in front of A's land; on A's riparian grant he gets no exclusive right of possession unless he reclaimed the land. Suppose he does not reclaim the lands and accretions form within the limits of

the riparian grant, yet in front of A's land. There can be no question but that those accretions would be the property of A, and yet under Judge White's suggestion, B would have title to them by virtue of the bounds of his riparian grant.

In fact, in the riparian grant to Bartlett, the riparian commissioners recognized the course running parallel with the street in the Burkhard and Bartlett deeds for the upland. The record shows that Burkhard acquired title by two deeds: One running from Dewey Place to Oriental Avenue; the other for lands northerly of Dewey Place, and conveyed to Bartlett. After acquiring this title, almost the entire tract first above mentioned became submerged and was submerged at the time of the making of the grant, yet the riparian commissioners ran their first course along the original westerly line of the Burkhard or Bartlett land, the first course in the riparian grant being as follows: "And from said beginning point south parallel with Vermont Avenue, 175 feet east at right angles from the east line of the same, 185 feet to a point in the east line of lands under water;" thence southeast in a straight line.

If the riparian commissioners intended to establish a rule that the line should be at right angles to the shore line, then the first course of the Bartlett grant should have been laid southeast from the beginning, and they should not have gone 185 feet parallel with Vermont Avenue before adopting the southeast course, so that the riparian commissioners have not followed what defendant contends should be the rule.

If title to the accretions was dependent upon the courses of the riparian grant, then by the act of the riparian commissioners in starting their first course

at right angles to the shore line from the beginning corner, would deprive the adjoining owner on the west of a considerable amount of accretions, because a line drawn southeast from a point 185 feet south of the beginning corner and 175 feet westerly of Vermont Avenue would be very much further west than a line drawn from the beginning corner southeast to the exterior line.

RIPARIAN GRANT WAS INEFFECTIVE.

Defendant showed title from a common grantor to a parcel of upland lying on the westerly side of New Hampshire Avenue, produced a riparian grant under the great seal of the state covering the *locus in quo*, and then by his brief contends that he has made out a *prima facie* case.

The defendant, however, did not in the trial of the case stop with the offering of his two deeds, but offered eight or more witnesses who testified that the ordinary high-water mark of the Atlantic Ocean about 1875 was very much further inland than at the present time, their testimony placing the high-water mark at or near the intersection of Vermont and Pacific Avenues, their testimony being to the effect that all easterly of that location, which included all the lands of complainant and of defendant, were then under the waters of the Atlantic Ocean. His witnesses, on cross-examination, uniformly testified that the ocean during severe storms made inroads upon the beach, washing it away from fifty to seventy-five feet during a single storm, and after the storm subsided the land would gradually reform, but before the regained land would equal the amount that had been previously carried away by the storm,

another storm would appear and make still further inroads into the beach; that this continued until after 1875.

There is undisputed testimony that in 1874 and 1875 a jetty was built into Absecon Inlet, called the Government Jetty, and soon thereafter the gains became more lasting. One of the witnesses, named Horner, testified that no gains were made, however, to the beach until three or four years after the jetty had been built; that for two or three years thereafter the beach continued to cut away.

The only fair inference to be drawn from the undisputed testimony concerning this jetty is that the building of the jetty had a tendency to divert the current from its previous channel. This could not be done all at one time but was done gradually, and as this current was diverted from its previous channel and formed a new channel further towards the north, it gave nature an opportunity to reform the beach.

The process of formation was clearly stated by Barclay Bullock, who testified that the heavy northeast storms dashing against the beach loosened the sand, and the weight of the wind on the water forced the water ahead of it up on the beach, and as the water must go some place and would not go back against the wind, it went to the bottom forming an opposite current from that above, and the bottom current being away from the beach, carried the loosened sand with it, thus making the inroads as above stated of anywhere from one to three hundred feet during a single storm. When these northeast storms would die down and the wind would blow from the west or northwest, the weight of the wind would carry the water out to the ocean, and the water being bound to find its level, caused an undercurrent to set in the opposite direction towards the

beach, and this undercurrent carried the loose sand with it, depositing it upon the shores of the beach, and thus forming the accretions that admittedly have been formed in this section.

During the course of the trial it was agreed by both complainant and defendant that the lands made up were made by the gradual increase from the ocean, and were accretions. Admitting then that defendants were in possession of the upland portion of their lots at the time the riparian grant was made, and admitting, without conceding, that the riparian grant was a valid grant at that time, it conclusively appears that since that time the accretions have formed and a considerable portion of the original grant, to wit, the *locus in quo*, has been covered by accretions, so that these lands now lie above the high-water mark, and on the opposite side of the street from that on which defendant's fast lands are located, and belong either to the plaintiff or defendant.

It is contended by the complainant that as these lands are now above the high-water mark and were formed by accretions, that defendant retains no title thereto by virtue of his riparian grant. It is further contended that the lands are accretions to complainant's lands in front thereof, and are entirely free from defendant's riparian grant. In other words, it is contended by complainant that the inland line of a riparian grant is ambulatory, and just as land makes up by accretions and excludes the water therefrom, just so is the land conveyed by such a riparian grant lessened in quantity and lost to the holder thereof.

It was said in the case of *Dewey Land Company v. Stevens*, 83 N. J. Eq. 314, that notwithstanding this riparian grant, if at the time it was made

> "the land did not belong to the state, its grant was ineffective; if the land belonged to the state

> at the time of the grant by reason of then being under tide water, but has reverted to its former owners by matters arising after the grant, the complainants are not in a position of questioning the grant, but of conceding its validity, and claiming that the title thereby granted has ceased to be effective."

This is precisely the position of the plaintiff. Assuming, but not conceding, that the riparian grant was properly described and legally made, our contention is that the only title the state could give when it made the grant was such title as it possessed and owned, which was the title to land under water, the inland boundary of which was ambulatory. In other words, the title of the state insofar as it is bounded by the high-water mark is subject to the shifting and changes occurring by the slow process of accretion and its correlative reliction. The right of the state to the lands under tide waters up to high-water mark is the precise equivalent of the right of the Crown in England to the same kind of property, and it is perfectly well settled in both England and this country, that as between the Crown, or the state, and the private owner, the rights of the former in case of gradual and imperceptible recession or accretion are shifting and will be delimited by the high-water mark. This familiar rule is thus expressed in *Gould on Waters*, Section 105:

> "Land formed by alluvion, or the gradual and imperceptible accretion from the water, and land gained by reliction, or the gradual and imperceptible recession of the water, belong to the owner of the contiguous land to which the addition is made. There is no distinction in this respect between soil gained by accretions and that

uncovered by reliction. The change is imperceptible when it is not discernible in its progress, though the fact that there has been an increase may be perceptible year by year, or at shorter intervals. Conversely, land gradually encroached upon by navigable waters ceases to belong to the former owner. The external bounds of estates situated upon the shore of the sea or navigable rivers may thus gradually shift as the water recedes or encroaches, although the right to the shore itself of course remains in the Crown or state."

The title of the state to high-water mark being thus a shifting one, dependent upon the gradual change in the position of high-water mark due to accretion, any one who takes title from the state to land under water of course takes such title subject to the same contingency of change or shifting in the boundary line. The state can give nothing more than it owns.

The situation is characteristically described by Judge Depue, delivering the opinion in the Court of Errors and Appeals in *Ocean City Association v. Shriver*, 35 Vr. 550-553, where he states:

"The avenue as delineated on the map is a fixed monument in the description in the deed and in that respect it differs from a boundary on the ocean, where, by force of the description itself, the title of the grantee will advance or recede as the line of the high water changes from time to time, and he will hold by the same boundary, including the accumulated soil that has arisen from alluvial formations. Scratton v. Brown, 4 Barn. & C. 485; Rex v. Yarborough, 3 Id. 91; S. C. H. L. sub nom. Gifford v.

Yarborough, 5 Bing. 163; Camden & Atlantic Land Co. v. Lippincott, 16 Vr. 405."

The case of *Scratton v. Brown,* 4 B. & C. 485, is directly in point. It was an action of trespass brought by the owner of shore lands, claiming under a grant from the Crown, against persons who had taken stone therefrom. The grant in question was between high and low-water mark as it existed in September, 1773. Since the date of the grant there had been a shift by imperceptibly slow changes in the location of low-water mark, and the question in the case was whether the title derived from the grant between high and low-water mark was only to such territory as lay between those points in 1773, when the grant was made, or whether the fact of accretion, or its correlative, was to change the location of the property to the land between low and high-water mark as at present existing. It was argued:

> "Then assuming that the deed conveyed a right of soil in the shore, it conveyed such right in that portion of land which from time to time should constitute the seashore, and not merely in that portion of land which constituted the seashore in 1773. It has been said that there cannot be such a thing as a movable freehold, and that this grant is void for uncertainty. But in Co. Litt. 48 b. it is laid down that where a person has a movable estate of inheritance in thirteen acres of land, parcel of a meadow of eighty acres, he may convey it by the description of thirteen acres lying within the meadow of eighty acres. That is an authority, therefore, to show that there may be a movable freehold, and that the description in the present case is sufficiently certain. The uncertainty in the

description, if any, arises wholly from the uncertainty of the subject-matter granted. Then, if there may be a movable freehold, and it is sufficiently described, the question is what was intended to pass. Now, it is clear, from the whole deed, that the grantor intended to part with all his interest in the shore which he himself had derived from the Crown. According to the late case of The King v. Lord Yardborough, 3 B. & C. 91, and the passages from Lord Hale's treatise De Jure Maris, there cited, it is established that land formed by the sea, by slow, gradual, and imperceptible accretion, *prima facie* belong to the Crown, as the shore, or the space between high and low-water mark, has been slowly and imperceptibly altered by the encroachment of the sea, the shore so altered would belong to the Crown, and of course to its grantee, and, therefore, now belongs to those who claim under the deed of 1773."

Upon this point Judge Bayley said:

"There is no dispute as to the limits on the east and west, but merely as to those on the north and south. It has been contended on the part of the plaintiff, that it does not convey that soil which from time to time is bounded by the high and low-water marks, but only that soil which at the time when the deed was executed was bounded by the then high and low-water marks. Now the passage cited from the 1st inst. 48 b., shows that there may be a movable freehold. It does not apply specifically to this case, because the case put there is of a given quantity of land fixed in situation, of which part from time to time may be vested in A and the other

part vested in B. The question here is, whether there may be a certain quantity of land shifting in situation and vesting in the same person at different times? That must be the case of land fronting the sea or a river, where, from time to time, the sea or river encroaches or retires. *If the sea leaves a parcel of land, the piece left belongs to the person to whom the shore there belongs.* The land between high and low-water marks originally belonged to the Crown, and can only vest in a subject as the grantee of the Crown. The Crown by a grant of the seashore would convey, *not that which at the time of the grant is between the high and low-water marks, but that which from time to time shall be between these two termini.* Where the grantee has a freehold in that which the Crown grants, his freehold shifts as the sea recedes or encroaches. Then what was the object? Then what was the object of the parties to the deed of 1773? To grant the land within certain limits? Those to the east and west were ascertained, but those on the north and south were to be ascertained by the high and low-water marks. I think that those words must be construed with reference to the rules of the common law upon the subject of accretion, and that as the high and low-water marks shift, the property conveyed by the deed also shifts. For these reasons I am of opinion that the plaintiff was not entitled to recover in respect of any part of the stones which were proved to have been taken between high and low-water marks."

It was because of the distinction between a slow and gradual growth by accretion rather than by sud-

den avulsion that the verdict was sustained in the leading case of *King v. Yarborough,* 3 B. & C. 91. Attention is directed to the very able argument of Phillips that precedes the opinion in the case, where he thus expresses the idea:

> "The true and only sensible meaning, is that where the increase is imperceptible in its progress, then the land becomes the property of the subject as it is formed; it is then vested in him *de die in diem;* and what is once vested in him cannot be divested by the circumstances of a still further increase afterwards taking place."

This case of *Scratton v. Brown, supra,* is referred to approvingly by Chancellor Runyon in *Nixon v. Walter,* 14 Stew. 107. So Judge Depue, in the leading case of *Camden & Atlantic Co. v. Lippincott,* 16 Vr. 405, had occasion to construe a deed, one course of which called for a boundary to and along "the storm tide mark of the Atlantic Ocean," and at page 415 says:

> "A more uncertain and vacillating boundary than that adopted for the seaward line in the Miles deed could not be devised. It cannot be taken as an absolute—a fixed—boundary. It must be treated as relative, and as having relation to the condition of things as they are from time to time."

He then refers approvingly to *Scratton v. Brown, supra,* as "the leading case on this subject"; and in the same manner refers to *In re Hull & Selby R. Co., infra,* as well as *Dunlop v. Stetson,* 4 Mason, 349, where Judge Story refers approvingly to *Scratton v. Brown.* Judge Depue also cites *Adams v. Frothingham,* 3 Mass. 352, and *Phillips v. Rhodes,* 7 M &c., 322, and adds:

"The principle on which these cases were decided is that in grants of lands lying along the seashore, the parties act with a knowledge of the variety of changes to which all parts of the shore are subject. The grantee takes no fixed freehold but one that shifts with the changes that gradually take place. The proprietor of lands having such a boundary is obliged to accept the alteration of his boundary by the gradual changes to which the shore is subject. He is subject to loss by the same means that may add to his territory; and as he is without remedy for his loss, so he is entitled to the gain which may arise from alluvial formations, and he will, in such cases, hold by the same boundary, including the accumulated soil. Tyler on Bounds, 40; Phear on Waters, 12-43; 3 Kent. 435; New Orleans v. United States, 10 Pet. 662-717. He takes his title, as was said by Mr. Justice Story in Dunlop v. Stetson, subject to those common incidents which may increase or diminish the extent of his boundaries."

See also *In the Matter of the Hull and Selby Railway,* 5 M. & W. 328. Here it appears that by gradual and imperceptible progress the tides had encroached upon what was formerly the foreshore of a river, and a railroad company, under its charter, had constructed its line across a portion of the property which had been so gradually encroached upon, and the question was whether the condemnation moneys should be paid to the Crown or to the owner of the former foreshore. Lord Abinger says:

"It is admitted, that as between subject and subject, the law as to gradual accretion is settled by the cause of Rex v. Lord Yardborough.

> The principle there established is not peculiar to this country, but obtains also in others, and is founded on the necessity which exists for some such rule of law, for the permanent protection and adjustment of property. It is different, indeed, where the change occurs by a sudden advance or recession of the water. In Scotland, a river containing a valuable salmon fishery belonging to the present Lord Chief Commissioner Adam, was suddenly transferred to the land of his neighbor. Afterwards, by another equally violent effort of Nature, the river returned to its former channel; but in neither case did the owner of the bed of the river lose his right to the soil. But in all cases of gradual accretion, which cannot be ascertained from day to day, the land so gained goes to the person to whom the land belongs, to which the accretion is added, and vice versa. This is the rule as between subject and subject; but it is said to be different as between the Crown and subject. But Sir F. Pollack says we all hold by grant from the Crown: Then the Crown holds by the same rights, and with the same limitations as its grantee. This being then the case of a gradual access of the water, it makes the land now between high and low-water mark the property of the Crown. No authority is needed for this position, but only the known principle which has obtained for the mutual adjustment and security of property. The money therefore, must be paid to the Crown."

In *DeLancey v. Wellbrock*, 113 Fed. Rep. 103, 105, we find:

> "With that construction, the next question is

the location of that tract upon the soil. The inshore boundary is the common high-water mark. There is no indication of any cataclysm that has taken place, making an extraordinary change there. Whatever shifting there has been in or out of the shore line has been only gradual and normal in its character. The evidence points that way. Under those circumstances, it seems to me the rule laid down in Scratton v. Brown, 4 Barn. & C. 485, and which is approved in Trustees v. Kirk, 84 N. Y. 215, 38 Am. Rep. 505 is the rule to be applied, that where the Crown grants a subject the soil to such an extent as that the shore itself may shift by entirely natural causes, without any earthquake or anything extraordinary, by the operation of accretion and erosion. Thus, under the circumstances, at one time the grantee of a strip like this might gain land towards the shore, but he would not gain on the whole, because the more he gained inshore by the shifting boundary the more he would lose by his outer boundary, and he would not get any more than 400 feet. And, per contra, he might lose from the land inside, and as long as his 400 foot line did not take him beyond the ownership of the soil of the State he would not lose on the whole, because it would shift his outer line out, though he might lose even then, because there might be no place for his outer line to go. I am of the opinion, therefore, that the common high-water mark as it stood at the time of the commencement of this suit, or thereabouts, is to be taken as the inshore boundary, from which the 400 feet are to be measured off; and, that being so, clearly the premises which are described in the complaint

are within the boundary of this particular grant. That being so, the next question that arises is, what is the effect of the subsequent deed of the Commissioner of the land to Wellbrock? I have gone over these cases (DeLancey v. Piepgrass, 138 N. Y. 26, 33 N. E. 822, and Same v. Hawkins, 23 App. Div. 8, 49 N. Y. Supp. 469), and it seems to me that the controlling point of view is just this: The State granted a fee. That has been held by the Court of Appeals. It granted a title in fee to the land under water—that 400 foot strip—to Palmer, and again, through the comptroller's deed, to Hunter. There was an easement reserved on it, an easement that the people possessed of navigating over it and anchoring and fishing; an easement that the State possessed over land covered with water, where the soil belonged to a private owner and the water was navigable. It is not necessary for us to discuss here what the State might or might not have done, in the way of exercising easement itself or authorizing anybody else. What the State undertook to do was to give, again, the fee to another person. That it could not do, in my opinion. I am referred to cases holding that a grant cannot be held void in a collateral action. But it is not necessary to declare it void. It is sufficient to declare that this deed here introduced in evidence does not convey to Mr. Wellbrock the right to maintain upon the land, the fee of which has already been granted to somebody else, the particular structure which he put up. These conclusions lead to the direction of a verdict in favor of the plaintiff."

Nor is there anything in the decision of the New Jersey Court of Errors and Appeals in the case of

Stevens v. Paterson & Newark R. R. Co., 34 N. J. Law, 532, or of this Court in *Hoboken v. Pennsylvania R. R. Co.*, 124 U. S. 656, that in any way militates against this view. The exact and only question involved in the Stevens case was whether, under the New Jersey law, an owner of the upland bordering upon a navigable stream had such an interest in the land below high-water mark as that the state could not, without his consent or making him compensation, grant to a railroad company the right to construct, across and in front of his land and below high-water mark, a structure for supporting a railroad. The land owner claimed a potential right of adjacency but the Court held that no such right existed prior to its being reclaimed, saying:

> "In all these controversies extending from ancient through modern times, I do not find that it has ever been suggested that as an incident to his estate the owner of the terra firma along the line of tide water is possessed of any peculiar privileges with the exception of those of alluvion and reliction—*privileges which are, perhaps countervailed by the loss to which he is subject from the washing away of his land.* * * * The owner of land along the shore is entitled to no right as an incident to such ownership *except the contingent* one of alluvion and reliction * * * and that such title was attended with the usual concomitants of all ownership of realty."

These quotations make it plain that the Court in the Stevens case not only expressly recognized rights arising by accretion or reliction but expressly excepted them from the conclusions it reached about the specific question that was involved.

In the Hoboken case above referred to the precise question was whether a street that was opened to an original high-water mark could be extended to an outer line as against a grant by the State to a railroad company which improved to such outer line over lands filled in under the grant. The affect of accretions was in no way involved in either case and this Court, at page 691 (124 U. S.) says:

> "In other words, under that grant the land conveyed was held by the grantees on the same terms on which all other lands are held by private persons under absolute title and *any previous right of the State of New Jersey therein*, whether proprietary or sovereign is transferred and extinguished, except such sovereign rights as the State may lawfully exercise over all other private property."

Indicating that the question was wholly one of a surrender of the State's rights and that there was no consideration whatever given to the private rights of the land owners arising from accretion.

Too much stress cannot be laid upon the decision of the Court of Errors and Appeals in 1897 in *Polhemus v. Bateman*, 60 N. J. Law, 163, which we believe to be the last word of the Court of last resort of New Jersey, long since the decision in both the Stevens case and the Hoboken case, as to the rights obtained under a riparian grant such as the defendants here rely on. The grants in all the cases were, necessarily, under the statute, limited to the statutes under which they purported to be given. They describe the property and the effort of the defendant to give to its riparian grant some peculiar virtue by reason of the fact that there is a specific description by metes and bounds out to the exterior

line of filling can in no way derogate from the ambulatory character of the starting point which now and then, of course, has greatly shifted.

QUIA TIMET.

The other aspect of the bill, presented by virtue of the new equity rules, is asserted in the sixth and seventh paragraphs of the bill, and is entirely independent of the New Jersey statute referred to, and is an appeal to the original equitable jurisdiction of the Court *quia timet*, seeking to remove from the title of the complainants to the *locus in quo* the cloud thereon arising by virtue of the riparian grant, which is alleged to be void and of no avail against the complainants.

The distinction between these two causes of action is noted in *Nixon v. Walter*, 41 Eq. 103, wherein a tract of land bounding on the high-water mark of Delaware Bay and Morris River Cove, having a width of six rods, was conveyed to one person and the land more remote from the bay was conveyed to another person, having for one of its boundaries the inward line of the six rod strip previously conveyed. The waters of the bay and cove gradually submerged the six acre tract, which at the time of the conveyance was high land, whereupon the owner of that tract made claim that he was entitled to a movable freehold, citing the case of *Scratton v. Brown*, and the owner of the more inland tract filed a bill to quiet title under the statute, but failed to maintain it as such bill because he was unable to prove peaceable possession, which had been denied by the defendant. He was permitted to maintain the bill as a bill *quia timet*, and obtained a decree in his favor, the Court

holding that the six rod strip of upland was a fixed freehold, and as that strip was eaten away by erosion, the owner thereof lost just as in the event of accretions he would have gained by the action of the waters. The right to maintain a bill *quia timet* is further shown by the following cases:

Sheppard v. Nixon, 43 Id. 627;
American Dock & Improvement Co. v. Trustees for the Support of Public Schools, 39 N. J. Eq. 409.

There are, therefore, two distinctions between the suit at bar and the New Jersey case, the decree in which is claimed to be *res judicata* of this issue.

First: Assuming, which we deny, that the New Jersey case decided anything and is *res adjudicata* of anything, it simply held that we have no title by virtue of the Leeds' and McClees' deeds. Here we are claiming both possession and title by virtue of accretion, an entirely distinct thing as appears from the opinion of Mr. Justice Swayze.

Second: We assert an independent claim under the general equitable jurisdiction of the Court, to have the cloud arising from the riparian grant removed, and our right to this relief is based not upon the statute but upon equitable principles *quia timet*. It is, therefore, obvious that, attributing to the New Jersey case the dignity of an adjudication (which it does not deserve) neither one of the issues here raised was raised there.

Petitioner urges that there are lines in conveyances in plaintiff's chain of title that do not run parallel to the street system, as argument against plaintiff's contention that the lands made by accre-

tion within the side lines of the lot, and extended parallel to the street system to the high-water mark belong to plaintiff. It is sufficient to say that all of the radial lines referred to by petitioner are under the high-water mark of the Atlantic Ocean, and have nothing whatever to do with the lands in question.

The order in the Court of Chancery upon the application to amend the final decree therein, page and the petition and order in the Court or Errors and Appeals, pages and , to amend the remittitur therefrom have been included in this brief, pursuant to the following stipulation:

"UNITED STATES SUPREME COURT.

STEVENS
v. No. 598.
ARNOLD, *et al.*

IT IS STIPULATED AND AGREED between counsel in the above stated cause that the order in the Court of Chancery of the State of New Jersey, bearing date the thirteenth day of December, 1915, page , and the petition filed in the Court of Errors and Appeals, dated the fifteenth day of June, 1920, page , and the order made thereon, bearing date the twenty-sixth day of June, 1920, page , may be printed in respondents' brief and used in the argument of the above stated cause.

HARVEY F. CARR,
Of Counsel with Petitioner.
GEORGE A. BOURGEOIS,
HARRY R. COULOMB,
Of Counsel with Respondents."

It is respectfully submitted that the decree of the United States District Court, affirmed in the Circuit

Court of Appeals for the Third Circuit, should be affirmed.

GEORGE A. BOURGEOIS,
HARRY R. COULOMB,
Attorneys and of Counsel with Respondents.
ROBERT H. McCARTER,
Of Counsel with Respondents.